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NORTH CAROLINA REPORTS
VOL. 192

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

[v.192]

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SPRING TERM, 1926
FALL TERM, 1926

REPORTED BY
ROBERT C. STRONG

RALEIGH
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Rule 46 of the Supreme Court is as follows:

Inasmuch as all the Reports prior to the 63d have been reprinted by the State, with the number of the Volume instead of the name of the Reporter, counsel will cite the volumes prior to 63 N. C., as follows:

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JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1926
FALL TERM, 1926

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ATTORNEY-GENERAL:

DENNIS G. BRUMMITT.

ASSISTANT ATTORNEY-GENERALS:

FRANK NASH,
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SUPREME COURT REPORTER:

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*Succeeded John H. Harwood, July 8, 1926.

108164

JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

EASTERN DIVISION

Name	*District*	*Address*
W. M. Bond	First	Edenton.
M. V. Barnhill	Second	Rocky Mount.
G. E. Midyette	Third	Jackson.
F. A. Daniels	Fourth	Goldsboro.
Romulus A. Nunn	Fifth	New Bern.
Henry A. Grady	Sixth	Clinton.
W. C. Harris	Seventh	Raleigh.
E. H. Cranmer	Eighth	Southport.
N. A. Sinclair	Ninth	Fayetteville.
W. A. Devin	Tenth	Oxford.

WESTERN DIVISION

Raymond G. Parker	Eleventh	Winston-Salem.
Thomas J. Shaw	Twelfth	Greensboro.
A. M. Stack	Thirteenth	Monroe.
W. F. Harding	Fourteenth	Charlotte.
John M. Oglesby	Fifteenth	Concord.
J. L. Webb	Sixteenth	Shelby.
T. B. Finley	Seventeenth	Wilkesboro.
Michael Schenck	Eighteenth	Hendersonville.
P. A. McElroy	Nineteenth	Marshall.
Walter E. Moore	Twentieth	Sylva.

SOLICITORS

EASTERN DIVISION

Name	*District*	*Address*
Walter L. Small	First	Elizabeth City.
Donnell Gillam	Second	Tarboro.
R. H. Parker	Third	Enfield.
Clawson L. Williams	Fourth	Sanford.
D. M. Clark	Fifth	Greenville.
James A. Powers	Sixth	Kinston.
L. S. Brassfield	Seventh	Raleigh.
Woodus Kellum	Eighth	Wilmington.
T. A. McNeill	Ninth	Lumberton.
W. B. Umstead	Tenth	Durham.

WESTERN DIVISION

S. Porter Graves	Eleventh	Mount Airy.
J. F. Spruill	Twelfth	Lexington.
F. D. Phillips	Thirteenth	Rockingham.
John G. Carpenter	Fourteenth	Gastonia.
Zeb. V. Long	Fifteenth	Statesville.
L. Spurgeon Spurling	Sixteenth	Lenoir.
Jno. R. Jones	Seventeenth	N. Wilkesboro.
J. W. Pless, Jr.	Eighteenth	Marion.
Robt. M. Wells	Nineteenth	Asheville.
Grover C. Davis	Twentieth	Waynesville.

LICENSED ATTORNEYS

FALL TERM, 1926

List of applicants to whom license to practice law in North Carolina was granted by Supreme Court at Fall Term, 1926:

ALLEN, JIMMIE YANCY EDWIN.....Roxboro.
BAILEY, JOHN ARLINGTON.....Woodsdale.
BARNES, MURRAY HAMILTON.....Washington, D. C.
BARRINGER, CAGER PARX.....Salisbury.
BASS, LUTHER THOMAS.....Seaboard.
BERRY, RUSSELL.....Rutherford College.
BLAIR, JOHN FRIES.....Winston-Salem.
BOOE, BRANTLEY CLEVELAND.....Cana.
BUFORD, CHARLES DUFFY.....New Bern.
BURKE, WILLIAM THOMAS, JR.....Salisbury.
BURNEY, JOHN JAY.....Wilmington.
BUTLER, SAMUEL JONES.....Wilmington.
CALDWELL, JAMES MCCORKLE.....Concord.
CARMICHAEL, MCKINNON.....New Bern.
COLLIER, ROBERT ALVIS.....Wake Forest.
CREECH, EDWIN KLUTTZ.....Goldsboro.
DODDERER, WILLIAM ANDREW.....Chapel Hill.
DUNCAN, DAVID DUDLEY.....Raleigh.
EDMUNDS, JOHN READE, JR.....Greensboro.
EDMUNDSON, EDWARD LEE.....Goldsboro.
EGERTON, WILLIAM ALEXANDER.....Hendersonville.
FINCH, RONALD EARL.....Black Mountain.
FLETCHER, WINFIELD SCOTT.....Greensboro.
FLOOD, EDMUND JOSEPH.....Washington, D. C.
FOUNTAIN, VINTON E.....Tarboro.
FOY, LOUIS FOWLER.....New Bern.
GAY, JAMES EDGAR, JR.....Winston-Salem.
GILLESPIE, JOHN THOMAS.....Statesville.
GLENN, JOHN MELVIN.....Gatesville.
GODFREY, GEORGE BISMARK.....Elizabeth City.
GRAY, ROBERT LEE.....Gray Court, S. C.
GREAVES, FLORENCE FISCUS.....Asheville.
GREENE, GEORGE LANDON.....Bakersville.
GRESHAM, EDWIN BEVERLY, JR.....Charlotte.
HARRIS, JAMES ALFRED.....Wadeville.
HARSHAW, MOSES RICHARD.....Lenoir.
HAWORTH, EDITH FLOY.....High Point.
HESTER, ROBERT JAMES, JR.....Elizabethtown.
HICKS, WILLIAM MINOR.....Oxford.
HOLDERNESS, WILLIAM HENRY.....Tarboro.
HOLLISTER, JOHN TULL, JR.....New Bern.
HONEYCUTT, WILLIAM CARSON.....Coats.
HORN, CHARLES COLEMAN.....Lawndale.
HORNER, JUNIUS MOORE, JR.....Asheville.
HOWARD, WELDON VANCE.....Elmwood.

HUFF, RICHARD ALEXANDER.....Asheville.
JENNINGS, JOHN HORACE.....Wilson.
JOHNSON, GASTON ASTUTE.....South Mills.
JOHNSON, JEFFERSON DEEMS, JR.....Garland.
JOHNSON, ROBERT GRADY.....Burgaw.
JONES, HUNTER MCGUIRE.....Galax, Va.
KENNEY, STEPHEN ETHERIDGE WINSTON.....Windsor.
KIMZEY, WILLIAM PATTON.....Brevard.
KIRKMAN, WILLIAM ROBERT.....Greensboro.
KISER, HARVEY EUGENE.....Kings Mountain.
LANE, SAMUEL RUSSELL.....Roxobel.
LEA, JAMES EVERETT, JR.....Washington, D. C.
LEGRAND, JOHN QUINCE.....Wilmington.
MCCALL, RAY CARL.....Ashford.
MACCLAMROCH, JAMES ROBBINS, JR.....Greensboro.
MCCLELLAND, ROYCE STANLEY.....Wilmington.
MCCOOK, HAROLD KENNEDY.....Washington, D. C.
MADRY, WILBUR DENNIS.....Scotland Neck.
MARTENET, EDWIN JEFFERSON.....Greensboro.
MASSEY, KARL RAY.....Leaksville.
MATTHEWS, WARREN DUNCAN.....Vass.
MEEKINS, MARZETTE WHITLEY.....Washington.
MILLER, WILLIAM BRAXTON.....Asheville.
MOORE, LARRY ICHABOD, JR.....New Bern.
MORRIS, ZEBULON ALEXANDER, JR.....Concord.
NEWBERRY, SAMUEL HILLIARD.....Morehead City.
NORFLEET, CHARLES EDWARD.....Winston-Salem.
O'TOOLE, JOHN HENRY.....Washington, D. C.
OWENS, JOHN RUFUS.....Marines.
PEARCE, EDWIN WOLFE.....Greensboro.
PECK, WILLIAM MURDOCK.....Wilmington.
PEELE, HOMER.....Raleigh.
PERKINS, GEORGE OLNEY.....Biltmore.
PHILLIPS, CARL DIXON.....Raleigh.
POOL, JAMES ROBERT.....Benson.
PULLIAM, ROBERT WILLIAM.....Boone.
RAMSEY, RALPH HEYWARD, JR.....Hendersonville.
RANSON, PAUL JONES.....Huntersville.
RENEGAR, HARVEY CALDWELL.....Chapel Hill.
RICE, CLAUDE ALVIN.....Washington, D. C.
ROBERTSON, CLEMENT TAYLOR.....Washington, D. C.
SHEA, FRANK JOSEPH.....Greensboro.
SHELTON, EPHRAIM LOWERY.....Randleman.
SHORB, DAVID JOSEPH.....Washington, D. C.
SMITH, DONALD WAKEFIELD.....Washington, D. C.
SPEARS, ELBERT LEONARD.....Aquadale.
SPRUILL, HENRY.....Plymouth.
STUART, CARL ROADMAN.....Marshall.
TAYLOR, CHARLES IRWIN.....Raleigh.
TAYLOR, TYRE CRUMPLER.....Sparta.
THEBAULT, JOSEPH ADRIAN.....Raleigh.
THOMAS, WILLIAM HENRY.....Hendersonville.
THOMAS, WILLIAM JOSEPH.....Washington, D. C.
TYSON, WILLIAM SHERROD.....Greenville.

VEST, SAMUEL ELTON.....Leaksville.
WAKEFIELD, WILLIAM CRAWFORD.....Cary.
WATKINS, BASIL GORDON.....Lynchburg, Va.
WHITE, ANDREW WARDLAW.....Abbeyville, S. C.
WILCOX, HAROLD LEON.....Scranton, Pa.
WILLIAMSON, MILTON CLAY.....Raleigh.
WYAND, HOWARD LAMAR.....Washington, D. C.
YARBOROUGH, ELEANOR SCOTT.....Louisburg.
YARBOROUGH, HILL.....Louisburg.
YOPP, CHARLES ROBINSON.....Wilmington.

License Granted to the following Comity Applicants:

BUSBEE, JAMES CHESTER (from South Carolina).....Black Mountain.
EMERSON, HAROLD BROWN (from Ohio).....Chimney Rock.
HELLER, LAWRENCE JONAS (from District of Columbia).....Asheville.
KING, ROBERT SIDNEY (from Virginia).....Asheville.
MCCOWN, MARION RYAN (from South Carolina).....Tryon.
MOORE, JOHN JOSEPH (from Ohio).....Cleveland, O.
WILSON, JOHN ESTILL (from Kentucky).....Asheville.

CALENDAR OF COURTS

TO BE HELD IN

NORTH CAROLINA DURING THE SPRING TERM OF 1927

SUPREME COURT

The Supreme Court meets in the city of Raleigh on the first Monday in February and the last Monday in August of every year. The examination of applicants for license to practice law, to be conducted in writing, takes place one week before the first Monday in each term.

The Judicial Districts will be called in the Supreme Court in the following order:

	Spring Term, 1927
First District	February 7
Second District	February 14
Third and Fourth Districts	February 21
Fifth District	February 28
Sixth District	March 7
Seventh District	March 14
Eighth and Ninth Districts	March 21
Tenth District	March 28
Eleventh District	April 4
Twelfth District	April 11
Thirteenth District	April 18
Fourteenth District	April 25
Fifteenth and Sixteenth Districts	May 2
Seventeenth and Eighteenth Districts	May 9
Nineteenth District	May 16
Twentieth District	May 23

SUPERIOR COURTS, SPRING TERM, 1927

The parenthesis numerals following the date of a term indicate the number of weeks during which the term may hold.

In many instances the statutes apparently create conflicts in the terms of court. Subject to any change that may be made by the General Assembly of 1927.

THIS CALENDAR IS UNOFFICIAL

EASTERN DIVISION

FIRST JUDICIAL DISTRICT

SPRING TERM, 1927—*Judge Daniels.*

Camden—Mar. 14.
Beaufort—Jan. 17*; Feb. 21† (2); April 11†; May 9† (2).
Gates—Mar. 28.
Tyrrell—Jan. 31†; April 25.
Currituck—Mar. 7; May 2†.
Chowan—April 4.
Pasquotank—Jan. 3† (2); Feb. 14†; Mar. 21; June 13† (2).
Hyde—May. 23.
Dare—May 30.
Perquimans—Jan. 24; April 18.

SECOND JUDICIAL DISTRICT

SPRING TERM, 1927—*Judge Nunn.*

Washington—Jan. 10 (2); April 18†.
Nash—Jan. 31; Feb. 21† (2); Mar. 14; April 25† (2); May 30.
Wilson—Feb. 7*; Feb. 14†; May 16*; May 23†; June 27†.
Edgecombe—Jan. 24; Mar. 7; April 4† (2); June 6 (2).
Martin—Mar. 21 (2); June 20

THIRD JUDICIAL DISTRICT

SPRING TERM, 1927—*Judge Grady.*

Northampton—April 4 (2).
Hertford—Feb. 28; April 18 (2).
Halifax—Jan. 31 (2); Mar. 21† (2); May 2* (A); June 6 (2).
Bertie—Feb. 14 (2); May 2† (3).
Warren—Jan. 17 (2); May 23 (2).
Vance—Jan. 10*; Mar. 7*; Mar. 14†; June 20†; June 27†.

FOURTH JUDICIAL DISTRICT

SPRING TERM, 1927—*Judge Harris.*

Lee—Mar. 28 (2); May 9.
Chatham—Jan. 17; Mar. 7†; Mar. 21†; May 16*; June 13.
Johnston—Feb. 21† (2); Mar. 14; April 25† (2).
Wayne—Jan. 24 (2); April 11† (2); May 30 (2).
Harnett—Jan. 10; Feb. 7† (2); May 23.

FIFTH JUDICIAL DISTRICT

SPRING TERM, 1927—*Judge Cranmer.*

Pitt—Jan. 17†; Jan. 24; Feb. 21†; Mar. 21 (2); April 18 (2); May 23† (2).
Craven—Jan. 10*; Feb. 7† (2); April 11†; May 16†; June 6*.
Carteret—Jan. 31; Mar. 14; June 13 (2).
Pamlico—May 2 (2).
Jones—April 4.
Greene—Feb. 28 (2); June 27.

SIXTH JUDICIAL DISTRICT

SPRING TERM, 1927—*Judge Sinclair.*

Onslow—Mar. 7; April 18† (2).
Duplin—Jan. 10† (2); Jan. 31*; Mar. 28† (2).
Sampson—Feb. 7 (2); Mar. 14† (2); May 2 (2).
Lenoir—Jan 24*; Feb. 21† (2); April 11; May 23*; June 13† (2).

SEVENTH JUDICIAL DISTRICT

SPRING TERM, 1927—*Judge Devin.*

Wake—Jan. 10*; Jan. 31†; Feb. 7*; Feb. 14†; Mar. 7*; Mar. 14† (2); Mar. 28† (2); April 11*; April 18† (2); May 2†; May 9*; May 23† (2); June 6*; June 13† (2).
Franklin—Jan. 17 (2); Feb. 21† (2); May 16.

EIGHTH JUDICIAL DISTRICT

SPRING TERM, 1927—*Judge Bond.*

New Hanover—Jan 17*; Feb. 7† (2); Mar. 7† (2); Mar. 21*; April 18† (2); May 16*; May 30† (2); June 13*.
Pender—Jan. 24; Mar. 28† (2); May 23.
Columbus—Jan. 31; Feb. 21† (2); May 2 (2).
Brunswick—Jan 10†; April 11; June 20†.

NINTH JUDICIAL DISTRICT

SPRING TERM, 1927—*Judge Barnhill.*

Robeson—Jan. 31*; Feb. 7; Feb. 28† (2); April 4† (2); May 16† (2).
Bladen—Jan. 10†; Mar. 14*; April 25†.
Hoke—Jan. 24; April 18.
Cumberland—Jan. 17*; Feb. 14† (2); Mar. 21† (2); May 2† (2); May 30*.

TENTH JUDICIAL DISTRICT

SPRING TERM, 1927—*Judge Midyette.*

Alamance—Feb. 28*; April 4†; May 9†; May 30† (2); June 20*.
Durham—Jan. 10† (2); Feb. 21*; Mar. 7† (2); Mar. 28*; May 2†; May 23*.
Granville—Feb. 7 (2); April 11 (2).
Orange—Mar. 21; May 16†.
Person—Jan. 31; April 25.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

SPRING TERM, 1927—*Judge Harding.*

Ashe—April 11 (2).
Forsyth—Jan. 10 (2); Feb. 14† (2); Mar. 14† (2); Mar. 28*; May 23† (3); June 27† (A).
Rockingham—Jan. 24*; Feb. 28† (2); May 16; June 20† (2).
Caswell—April 4.
Alleghany—May 9.
Surry—Jan. 10† (2); Feb. 7; Mar. 21† (2); April 25 (2); June 27† (2).

TWELFTH JUDICIAL DISTRICT

SPRING TERM, 1927—*Judge Oglesby.*

Davidson—Jan. 31*; Feb. 21† (2); May 9*; May 30†; June 27*.
Guilford—Jan. 10† (2); Jan. 24*; Feb. 7† (2); Mar. 7* (2); Mar. 21† (2); April 18† (2); May 2*; May 16† (2); June 6† (2); June 20*.
Stokes—April 4*; April 11†.

THIRTEENTH JUDICIAL DISTRICT

SPRING TERM, 1927—*Judge Webb.*

Stanly—Feb. 7†; April 4; May 16†.
Richmond—Jan. 3†; Jan. 10*; Mar. 21†; April 11*; May 30†; June 20†.
Union—Jan. 31*; Feb. 21† (2); Mar. 28†; May 9†.
Anson—Jan. 17*; Mar. 7†; April 18; April 25†; June 13†.
Moore—Jan. 24*; Feb. 14†; May 23†.
Scotland—Mar. 14†; May 2; June 6.

FOURTEENTH JUDICIAL DISTRICT

SPRING TERM, 1927—*Judge Finley.*

Mecklenburg—Jan. 10*; Feb. 7† (3); Feb. 28*; Mar. 7† (2); April 4†(2); May 2† (2); May 16*; May 23† (2); June 13*; June 20†.
Gaston—Jan. 17*; Jan. 24† (2); Mar. 21† (2); April 18*; June 6*.

FIFTEENTH JUDICIAL DISTRICT

SPRING TERM, 1927—*Judge Schenck.*

Montgomery—Jan. 24*; April 11† (2).
Randolph—Mar. 21† (2); April 4*.
Iredell—Jan. 31 (2); Mar. 14†; May 23 (2).
Cabarrus—Jan. 10 (2); Feb. 28†; April 25 (2).
Rowan—Feb. 14 (2); Mar. 7†; May 9 (2).

SIXTEENTH JUDICIAL DISTRICT

SPRING TERM, 1927—*Judge McElroy.*

Catawba—Jan. 17† (2); Feb. 7 (2); May 9† (2).
Lincoln—Jan. 24† (2).
Cleveland—Mar. 28 (2).
Burke—Mar. 14 (2); June 6† (2).
Caldwell—Feb. 28 (2); May 23† (2).

SEVENTEENTH JUDICIAL DISTRICT

SPRING TERM, 1927—*Judge Moore.*

Alexander—Feb. 21.
Yadkin—Feb. 28*; May 16† (2).
Wilkes—Mar. 7 (2); May 30† (2).
Davie—Mar. 21; May 23†.
Watauga—Mar. 28 (2).
Mitchell—April 11 (2).
Avery—April 25 (2).

EIGHTEENTH JUDICIAL DISTRICT

SPRING TERM, 1927—*Judge Parker.*

Transylvania—Jan. 31*; April 11 (2).
Henderson—Jan. 10† (2); Mar. 7 (2); May 30† (2).
Rutherford—Feb. 7† (2); May 16 (2).
McDowell—Feb. 21 (2); June 13† (2).
Yancey—Mar. 28 (2).
Polk—April 25 (2).

NINETEENTH JUDICIAL DISTRICT

SPRING TERM, 1927—*Judge Shaw.*

Buncombe—Jan. 10† (2); Jan. 24; Jan. 31; Feb. 7† (2); Feb. 21; Mar. 7† (2); Mar. 21; April 4† (2); April 18; May 2† (2); May 16; May 30; June 6† (2); June 20 (2).
Madison—Feb. 28; Mar. 28; April 25; May 23.

TWENTIETH JUDICIAL DISTRICT

SPRING TERM, 1927—*Judge Stark.*

Haywood—Jan. 10† (2); Feb. 7 (2); May 9† (2).
Cherokee—Jan. 24† (2); April 4 (2); June 20†.
Jackson—Feb. 21 (2); May 23† (2).
Swain—Mar. 7 (2).
Graham—Mar. 21 (2): June 6† (2).
Clay—April 18.
Macon—April 25 (2).

*For criminal cases only.
†For civil cases only.
‡For jail and civil cases.
(A) Emergency Judge to be assigned.

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

Eastern District—Isaac M. Meekins, *Judge*, Wilson.
Western District—James E. Boyd, *Judge*, Greensboro.
Western District—Edwin Yates Webb, *Judge*, Shelby.

EASTERN DISTRICT

Terms—District courts are held at the time and place as follows:

Raleigh, fourth Monday after fourth Monday in April and October. Civil terms, first Monday in September. S. A. Ashe, Clerk.

Elizabeth City, first Monday in April and second Monday in October. J. P. Thompson, Deputy Clerk, Elizabeth City.

Washington, third Monday in April and October. Arthur Mayo, Deputy Clerk, Washington.

New Bern, fourth Monday in April and October. Albert T. Willis, Deputy Clerk, New Bern.

Wilmington, second Monday after the fourth Monday in April and October. H. H. Ford, Deputy Clerk, Wilmington.

Fayetteville, Monday before the last Monday in March and September. S. A. Ashe, Clerk, Raleigh.

Wilson, second Monday in April and first Monday in October. S. A. Ashe, Clerk, Raleigh.

OFFICERS

Irvin B. Tucker, United States District Attorney, Whiteville.
J. D. Parker, Assistant United States District Attorney, Smithfield.
Willis G. Briggs, Assistant United States District Attorney, Raleigh.
R. W. Ward, United States Marshal, Raleigh.
S. A. Ashe, Clerk United States District Court, Raleigh.

WESTERN DISTRICT

Terms—District courts are held at the time and place as follows:

Greensboro, first Monday in June and December. R. L. Blaylock, Clerk; Myrtle Dwiggins, Chief Deputy; Della Butt, Deputy.

Statesville, third Monday in April and October. W. W. Leinster, Deputy Clerk.

Asheville, first Monday in May and November. J. Y. Jordan and O. L. McLurd, Deputy Clerks.

Charlotte, first Monday in April and October. E. S. Williams, Deputy Clerk.

Wilkesboro, fourth Monday in May and November. Milton McNeill, Deputy Clerk.

Salisbury, fourth Monday in April and October. W. W. Leinster, Deputy Clerk, Statesville.

Shelby, fourth Monday in September and third Monday in March. E. S. Williams, Deputy Clerk, Charlotte.

Winston-Salem, fourth Monday in June and December. (No deputy appointed.) Records in Greensboro office.

OFFICERS

Frank A. Linney, United States District Attorney, Charlotte.
F. C. Patton, Assistant United States Attorney, Charlotte.
R. G. Bingham, Assistant United States Attorney, Wilkesboro.
K. J. Kindley, Assistant United States Attorney, Charlotte.
Brownlow Jackson, United States Marshal, Asheville.
R. L. Blaylock, Clerk United States District Court, Greensboro.

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1926

STATE v. MARTIN BOST.

(Filed 27 May, 1926.)

1. Homicide—Murder—Self-Defense—Evidence—Instructions.

Where the evidence of the prisoner upon a trial for a homicide, tends to show that the deceased was under the influence of drink, and unprovoked, cursed him and threatened his life, and threateningly approached him to within a few feet, on the prisoner's own premises, with the axe upraised against him: *Held*, upon this evidence, the prisoner was entitled to an instruction, without special request therefor, that he was not only entitled to use sufficient force to repel force in order to save his life or himself from great bodily harm, but to exceed such force if in the opinion of the jury it reasonably appeared to him that such excessive force was necessary.

2. Same—Burden of Proof.

The burden is on the defendant tried for a homicide, relying on self-defense, to show it by the greater weight of the evidence.

STACY, C. J., dissenting; CLARKSON, J., concurring in the dissenting opinion.

APPEAL by defendant from *Lane, J.*, at October Term, 1925, of CABARRUS. New trial.

Indictment for murder. Verdict: guilty of manslaughter. From judgment upon verdict, that defendant be confined in the State's prison for a term of five years, defendant appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Hartsell & Hartsell, H. S. Williams, J. Lee Crowell and J. Lee Crowell, Jr., for defendant.

CONNOR, J. The evidence submitted to the jury upon the second trial of this action, had in consequence of the disposition of defendant's appeal from the judgment rendered at the first trial, in the Superior Court of Cabarrus County, to the Spring Term, 1925, of this Court, as reported in 189 N. C., 639, was substantially the same as that upon the former trial. Assignments of error upon this appeal are based upon exceptions to instructions given by the court in the charge to the jury, and also upon exceptions to the failure of the court to give certain instructions requested by defendant in writing.

There was evidence upon both trials supporting defendant's contention that he killed deceased in self-defense, and that, therefore, the homicide was justifiable, or at least excusable. Defendant complains that upon the last trial, as upon the former, the jury was not instructed fully and correctly as to the principles of law applicable to the facts as the jury should find them from the evidence. He contends that upon these facts, notwithstanding his admission that he killed deceased with a deadly weapon, he is not guilty, as charged in the indictment, for that he killed deceased in self-defense.

We said in the opinion upon the former appeal that there was no substantial evidence on the record tending to show that defendant had provoked the difficulty with deceased, or had entered into it willingly. It may be conceded that there was some evidence on the second trial, tending to contradict the testimony of defendant, as a witness in his own behalf, and to support the contentions of the State, which was not offered at the former trial; there is no evidence, however, from which the jury could have found that there was a fight or mutual combat between defendant and deceased, at any time before the fatal shots were fired by defendant. The evidence relied upon by defendant, consisting chiefly of his own testimony, was identical on both trials. Upon the former appeal, in view of defendant's evidence, we held that it was error, entitling defendant to a new trial, for the court to fail to instruct the jury, although not requested to do so, by prayer for special instruction, that the right of self-defense may be restored to a defendant, although he provoked the difficulty, or entered into it willingly, if the jury shall find that during the progress of the fight, which followed the difficulty, he quit the combat, in good faith, and gave notice to his adversary of such action on his part. This principle is well settled, and in view of the instruction given to the jury by the court on the former

trial that defendant could not rely upon the plea of self-defense if he provoked his adversary to the fight, or entered into it with him willingly, it was held that it was error for the court to fail to so instruct the jury, notwithstanding there was no substantial evidence from which the jury could find facts to which these principles of law are applicable. *S. v. Jones,* 188 N. C., 142; *S. v. Moore,* 185 N. C., 637; *S. v. Baldwin,* 184 N. C., 789; *S. v. Robinson,* 181 N. C., 552; *S. v. Finch,* 177 N. C., 599; *S. v. Crisp,* 170 N. C., 785; *S. v. Kennedy,* 169 N. C., 326; *S. v. Pollard,* 168 N. C., 116; *S. v. Cox,* 153 N. C., 638; *S. v. Garland,* 138 N. C., 678, 30 C. J., p. 53, sec. 223.

Upon the trial below, resulting in the judgment from which defendant has again appealed, the court instructed the jury as follows:

"If the defendant has shown to your satisfaction by any evidence in the case that he was at a place where he had a right to be, and that he was assaulted, that a felonious assault was being made upon him, that is, an assault with intent to kill, a murderous assault was actually being made upon him, and that he had reasonable grounds to believe and did believe that he was about to suffer death or great bodily harm at the hands of deceased, then, in that event, the law says that he could stand his grounds and meet force with force, and use such force as appeared reasonably necessary to him to repel the assault, and to protect himself from death or great bodily harm, without being guilty of any crime whatever."

Defendant excepted to this instruction, contending that there was error in that the court unduly limited defendant to the use of such force only as was required to repel the assault of deceased upon defendant, by meeting with like force the force exerted by deceased; defendant insists that in view of the evidence, the court should have further instructed the jury that if they found that defendant believed and had reasonable grounds to believe that it was necessary for him to shoot deceased before he got within striking distance of defendant, with the axe, defendant had a right, in self-defense, to shoot deceased with his pistol, and that although the wounds inflicted by defendant upon deceased with the pistol were fatal, defendant was not guilty, under the indictment, and that the jury should so say by the verdict.

This Court said, in *S. v. Lucas,* 164 N. C., 471: "It is held for law in this State that when an unprovoked and murderous assault is made on a citizen, he is not required to retreat, but may stand his ground, and take the life of his assailant, if it is necessary to do so, to save himself from death or great bodily harm." *S. v. Hough,* 138 N. C., 663; *S. v. Blevins,* 138 N. C., 668; *S. v. Dixon,* 75 N. C., 275, are cited in support of this statement of the law. In the last cited case, it is said: "The general rule is that one may oppose another attempting the

perpetration of a felony, if need be, to the taking of the felon's life; as in the case of a person attacked by another, intending to murder him, who thereupon kills his assailant. He is justified." 2 Bish. Cr. Law, sec. 632. Again it is said: "A man may repel force with force, in defense of his person, habitation or property, against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony, such as murder, rape, burglary, robbery and the like, upon either. In these cases, he is not obliged to retreat, but may pursue his adversary, until he has secured himself from all danger; and if he kill him in so doing, it is called justifiable homicide." 1 East P. C., 271; 2 Bish. Cr. Law, sec. 633.

In *S. v. Johnson,* 184 N. C., 637, *Justice Walker,* writing for the Court, says: "It all comes to this, that if the jury find that the prisoner did not fight willingly, except in the sense that he was compelled to do so in order to defend himself, and was himself without fault, and he was feloniously or murderously attacked by the deceased, so that it reasonably appeared to him and he believed, that his life was in danger, or that he was about to receive great bodily harm, his right of self-defense was in such case, if found by the jury, complete and justifiable, and if he slew his adversary under such circumstances, the jury should acquit him."

In *S. v. Hill,* 141 N. C., 769, it is said: "It is true, as a general rule, or under ordinary circumstances, that the law does not justify or excuse the use of a deadly weapon to repel a simple assault. The principle does not apply, however, where from the testimony it may be inferred that the use of such weapon was or appeared to be reasonably necessary to save the person assaulted from great bodily harm—such person having been in no default in bringing on or unlawfully entering into the difficulty. This was held in *S. v. Matthews,* 78 N. C., 523."

The evidence submitted to the jury tended to show that defendant at the time of the homicide was 65 years of age, and weighed about 150 pounds; that deceased was 41 years of age, and weighed about 200 pounds. Defendant lived alone on his farm, about six miles from Concord, the county-seat of Cabarrus County. Deceased, who lived at a distance of about five miles from the home of defendant, had been his guest during the night preceding the day on which the homicide occurred. He had remained at the home of defendant during the day, no one else being there during the day or at the time of the homicide. When deceased came to defendant's home, about dark of the preceding night, he brought with him a jug, containing wine. Defendant and deceased drank wine from the jug during the night; the next day deceased continued to drink wine, but defendant did not drink during the day; he attended to his work about his premises, looking after his stock, and

milking his cows. After milking his cows, late in the afternoon, defendant was in a room, which opened on his back porch, putting away the milk. He heard deceased, whom he had left on the porch, kicking at a door, leading into one of the rooms of his house. He reproved deceased for doing so; deceased became angry and began to curse and to threaten to go into the room where defendant was, to kill him, saying that he had a gun and would shoot defendant. In a few moments, defendant saw deceased coming up to the porch from the yard, with an axe, which defendant kept at the wood-pile, about thirty feet from the porch. Deceased had the axe drawn over his shoulder and was cursing defendant, and using violent language. Defendant knew that deceased was a dangerous and violent man, especially when he had been drinking. When deceased was almost in striking distance of him, defendant picked up his pistol, and fired twice, probably three times at deceased, who fell, mortally wounded by the pistol shots. Defendant went at once to the home of a neighbor and told him what had occurred at his home. He and the neighbor returned to his home, and found the body of deceased lying on the porch. Deceased was taken that night to a hospital, where he died the next day. Defendant went to Concord, early the next morning, and surrendered to the sheriff of the county.

In view of the evidence, tending to establish the foregoing facts, we think defendant was entitled to an instruction to the jury that upon their finding from the evidence the facts so to be, defendant had the right, under the law of self-defense, not only to meet force with force, and to use such force as appeared reasonably necessary to repel the assault and to protect himself, but also the right to shoot his assailant, if the jury should find that under the circumstances, it reasonably appeared to defendant necessary to shoot deceased in order to save himself from death or great bodily harm at the hands of deceased. Defendant admitted that he shot deceased, and that the wounds thus inflicted caused the death of deceased. He contended that his act in so doing was justifiable; the jury should have been instructed specifically as to the law applicable to the facts as defendant contended them to be with respect to the act of defendant. The court had correctly instructed the jury that the admission of defendant that he killed deceased with a deadly weapon, was sufficient to support a verdict of guilty of murder in the second degree, and that the burden was thus thrown by the law upon defendant to satisfy the jury that he killed in self-defense as he contended. The instruction given to the jury, to which defendant excepted, is correct; we think, however, that it was not as full as defendant was entitled to. We have examined the entire charge to the jury, as set out in the case on appeal. We do not find that defendant has had the full

benefit of the well-settled principle of the law of self-defense, applicable to the facts as he contended them to be.

We cannot sustain defendant's assignments of error based upon his exceptions to the refusal of the court to give the special instructions set out in the case on appeal. These instructions present defendant's contention that, under the law applicable to the facts as he contends them to be, he had the right to shoot and kill deceased. They omit, however, the principle that defendant must not only believe, but have reasonable grounds to believe it necessary to shoot and kill his assailant, in order for the jury to acquit him upon the principle of self-defense. The instructions prayed for are erroneous and were properly refused by the court. For the error indicated there must be a

New trial.

STACY, C. J., dissenting: His Honor charged the jury that if a felonious assault was being made upon the defendant at the time he shot the deceased, and he believed, with reasonable ground for his belief, that he was about to suffer death or great bodily harm at the hands of his assailant, then, and in that event, he not only had the right to "stand his ground and meet force with force, and use such force as appeared reasonably necessary to him to repel the assault," but that he also had the right under the law to use such force as appeared reasonably necessary "to protect himself from death or great bodily harm, without being guilty of any crime whatever." (See instruction set out in opinion of Court.) But this is held for error because the judge did not go further and tell the jury "if they found the defendant believed, and had reasonable grounds to believe, that it was necessary for him to shoot deceased before he got within striking distance of defendant, with the axe, defendant had the right, in self-defense, to shoot deceased with his pistol." This, in substance at least, is what the judge did tell the jury, as I understand the instruction. What else could the jury have thought the judge was talking about when he said, "If the defendant has shown to your satisfaction, . . . that a felonious assault was being made upon him, . . . and that he had reasonable grounds to believe, and did believe, that he was about to suffer death or great bodily harm at the hands of the deceased, then, and in that event, the law says that he could stand his ground and meet force with force, and use such force as appeared reasonably necessary to him to repel the assault, and *to protect himself from death or great bodily harm* (italics added), without being guilty of any crime whatever?" It was admitted that the defendant shot the deceased with a pistol, and the lawfulness of his conduct, under the circumstances, was the only question before the jury. The jury must have understood that if a felonious assault was being made

upon the defendant and he believed, with reasonable ground for his belief, that he was about to suffer death or great bodily harm at the hands of the deceased, then, and in that event, he could stand his ground and use such force as was necessary, or such force as reasonably appeared necessary, to protect himself from death or great bodily harm, without being guilty of any crime whatever. *S. v. Lipscomb,* 134 N. C., 692.

The defendant is entitled to no more favorable instruction under the evidence as it appears on the record.

The right of self-defense is firmly imbedded in our law, but it rests upon necessity, real or apparent, and the decisions are to the effect:

1. That one may kill in defense of himself or his family, when necessary to prevent death or great bodily harm. *S. v. Gray,* 162 N. C., 608.

2. That one may kill in defense of himself, or his family, when not actually necessary to prevent death or great bodily harm, if he believes it to be necessary and has a reasonable ground for the belief. *S. v. Barrett,* 132 N. C., 1007.

3. That the reasonableness of this belief or apprehension must be judged by the facts and circumstances as they appeared to the party charged at the time of the killing. *S. v. Blackwell,* 162 N. C., 683.

4. That the jury and not the party charged, is to determine the reasonableness of the belief or apprehension upon which he acted. *S. v. Nash,* 88 N. C., 618.

There is a distinction made by the text-writers on criminal law, which seems to be reasonable and supported by authority, between assaults with felonious intents and assaults without felonious intent. "In the latter, the person assaulted may not stand his ground and kill his adversary if there is any way of escape open to him, though he is allowed to repel force by force and give blow for blow. In the former class, where the attack is made with murderous intent, the person attacked is under no obligation to fly, but may stand his ground and kill his adversary, if need be." 2 Bishop's Criminal Law, sec. 6333, and cases cited. It is said in 1 East Pleas of the Crown, 271: "A man may repel force by force in defense of his person, habitation, or property against one who manifestly intends or endeavors by violence to commit a felony, such as murder, rape, burglary, robbery, and the like, upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger, and if he kill him in so doing it is called justifiable self-defense." The American doctrine is to the same effect. See *S. v. Hough,* 138 N. C., 666, and *S. v. Dixon,* 75 N. C., 275.

In the exercise of the right of self-defense, more force must not be used than is reasonably necessary under the circumstances, and if exces-

sive force or unnecessary violence be used, the party charged will be guilty of manslaughter, at least (*S. v. Robinson,* 188 N. C., 784), but the law does not require juries to measure with exactness and nicety the amount of force used, if one is really fighting in self-defense. *S. v. Pugh,* 101 N. C., 737.

And it has been said that where officers of the law, engaged in making arrests, are acting in good faith, and force is required to be used, their conduct should not be weighed in golden scales. *S. v. Pugh,* 101 N. C., 737; *S. v. McNinch,* 90 N. C., 696.

The present case has beeen tried twice in the Superior Court and this is the second appeal here. In my opinion, the alleged error in the charge is too attenuated to warrant a new trial.

CLARKSON, J., concurs in dissent.

MRS. MINTIE MORTT v. LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, LIMITED.

(Filed 27 May, 1926.)

1. **Insurance—Fire—Policy—Contracts—Inventory Clause — Substantial Compliance—Evidence.**

   An inventory of a stock of general merchandise containing the number of articles and cost of each class at a date made about one month before the fire, and testified to as being practically the same as on the date of the fire, is a substantial compliance with the inventory provision in the standard form of a fire insurance policy, and is competent as evidence upon the trial. C. S., 6347.

2. **Insurance—Fire—Policies—Contracts—Unconditional Ownership—Assignment—Assent of Insurer.**

   The clause in a fire insurance policy that the insured must be the unconditional owner of the property insured, and that an assignment of the policy to a purchaser will render the policy void if not assented to by the officials of the insurer, is valid and enforceable in favor of the company against the assured and his assignee.

3. **Insurance, Fire—Unconditional Ownership—Assignment of Policy—Premium Entire and Single.**

   Where the owner of a store and a stock of merchandise is insured at one premium rate, the merchandise to remain in the store during the term covered by the contract, a change of ownership of the merchandise, without the consent of the insurer, will avoid the obligation of the insurer, under an express condition relating thereto contained in the policy, under the principle that the premium is entire, and the obligation single, and each dependent on the other.

4. Same—Principal and Agent—Ratification.

Where the owner of a building and merchandise therein has sold the merchandise, thus rendering the policy void, according to its terms, and thereafter the insurer, with knowledge has retained the unearned premiums after its agent had consented to the assignment of the policy to the purchaser of the merchandise, the insurer will be bound, under the terms of the policy, to the payment of damages to the assignee of the policy, the purchaser of the merchandise, caused by a fire thereafter occurring, under the principle of ratification.

APPEAL by defendant from *Walter E. Brock, Emergency Judge,* at January Term, 1926, of HAYWOOD. No error.

Action to recover upon policy of insurance for loss resulting from total destruction, by fire, of stock of merchandise, and store furniture and fixtures, contained in a store building at Japan, Graham County, N. C. The policy was, in form, the Standard Fire Insurance Policy of the State of North Carolina. C. S., 6437. It was issued by defendant on 5 April, 1924, and in consideration of the stipulations therein named and of the premium therein recited, insured C. D. Mortt, as owner, against loss or damage, by fire, for the term of one year, to a store building, in the sum of $150, to a stock of merchandise, while contained in said building, in the sum of $1,900, and to store furniture and fixtures, while contained in said building, in the sum of $80. The policy contains, among others, the following provision, to wit:

"This entire policy shall be void, unless otherwise provided by agreement in writing, added thereto . . .

"(d) if any change, other than by the death of the insured, takes place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard); or

"(e) if this policy be assigned before a loss."

On 1 May, 1924, the insured, C. D. Mortt, sold the store building, covered by the policy, to T. J. Edwards, to whom he and his wife, the plaintiff in this action, conveyed the same by deed which was duly recorded on 3 May, 1924, in Graham County.

On 19 June, 1924, C. D. Mortt sold the stock of merchandise, and the store furniture and fixtures, covered by the policy, to the plaintiff, Mrs. Mintie Mortt, his wife; the policy was on said date duly assigned by C. D. Mortt to the plaintiff, with the consent in writing of defendant, as appears from indorsements on said policy.

Thereafter, to wit, on 29 July, 1924, the store building, together with the stock of merchandise and the store furniture and fixtures, were totally destroyed by fire. The policy contains the Three-fourths Value Clause. The stock of merchandise, as shown by the inventory taken by plaintiff on 30 June, 1924, was worth $3,097. The store furniture and fixtures were worth $200.

Plaintiff testified that Mr. Long, the agent of defendant, who issued the policy, and who signed the indorsement, consenting in behalf of defendant to its assignment by C. D. Mortt to plaintiff, knew that her husband, C. D. Mortt, had sold and that he and she had conveyed the store building prior to the date of the assignment; that she did not remember whether she told him so or not, but that her husband had told him of the sale. Mr. Mortt testified that after the issuance of the policy and prior to the sale of the stock of merchandise to plaintiff, and the assignment of the policy to her, he had a conversation with Mr. Long about the sale of the building; that he talked with him about the sale. Defendant offered no evidence.

The issues submitted to and answered by the jury were as follows:

1. Did the plaintiff and the defendant enter into this contract for insurance, as alleged in the complaint? Answer: Yes.

2. Was the plaintiff's stock of goods and fixtures destroyed by fire, as alleged in the complaint? Answer: Yes.

3. What amount, if any, is the plaintiff entitled to recover? Answer: $1,980, with interest from 29 September, 1924.

From judgment upon this verdict defendant appealed.

Morgan & Ward for plaintiff.

Alley & Alley and John M. Robinson for defendant.

CONNOR, J. Defendant's first assignment of error is based upon its contention that "the court erred in allowing the plaintiff to introduce in evidence the alleged inventory dated 30 June, 1924, consisting of seven sheets, and marked 'Exhibit P-I.'" Plaintiff testified that she and her husband made the inventory of the articles of merchandise, composing her stock of goods, on 30 June, 1924; the articles were listed at the cost price. The fire occurred on 29 July, 1924. Between the date of the inventory and the date of the fire, plaintiff was sick, and sold very few goods from the stock. More goods came in than were sold. The sheets offered in evidence as an inventory show the number of pairs of shoes, with stock number and price of each, and the value of the groceries, hardware, dry goods, notions, hats, pants, boys' and men's suits, separately. In view of the character of the business which plaintiff was conducting, and the size of her stock, we must hold that there was a substantial compliance by her with the provisions of the policy, relative to an inventory. *Arnold v. Ins. Co.*, 152 N. C., 232. We find no error in the overruling by the court of defendant's objection to the evidence.

By its exceptions to the refusal of the court to allow its motion for judgment as of nonsuit, at the close of the evidence, and to the instruc-

tion of the court to the jury that "if you believe the evidence, you will answer the first issue. 'Yes,' the second issue 'Yes,' and the third issue, '$1,980, with interest from 29 September, 1924,' " defendant presents its contention that plaintiff cannot recover in this action for that the entire policy was avoided by the sale and conveyance by the insured of the store building covered by the policy, not only as to the building conveyed, but also as to the stock of merchandise and as to the store furniture and fixtures. Plaintiff contends that, conceding that by the change in the ownership of the store building, resulting from its sale and conveyance by the insured, prior to the assignment of the policy to plaintiff, the policy was avoided as to the store building, it was and remained in full force and effect with respect to the stock of merchandise and to the store furniture and fixtures. These contentions involve the question as to whether the contract evidenced by the policy was divisible or indivisible as between C. D. Mortt, the insured, and defendant, the insurer. This question has been authoritatively determined in this jurisdiction. Conceding that there is much conflict among the decisions in different jurisdictions on the question here presented, this Court has said in *Coggins v. Ins. Co.,* 144 N. C., 8: "Without going into any extended review of these different decisions, we are of the opinion that the great weight of authority, as well as the better reason, establishes the position that when to the fact that the premium is entire, there is added the fact of identity of risk, the obligation is single, and on the breach of the stipulation all recovery is barred. This question of identity of risk being held the determinative factor in policies of this kind, where the amounts are separate and the premiums entire, is very well treated in a note to *Wright v. Ins. Co.,* 19 L. R. A., 211." *Cuthbertson v. Ins. Co.,* 96 N. C., 480, and *Biggs v. Ins. Co.,* 88 N. C., 141, are cited in support of the holding that identity of risk is the controlling feature in the decision of the question.

In *Coggins v. Insurance Company,* the policy covered the building and also a stock of merchandise, contained therein, the amount of insurance on the building being fixed in the policy at $200, and that on the stock of merchandise at $1,500. Both were destroyed by fire, before the expiration of the term for which the property had been insured. There was a violation of the "iron-safe clause." It was held that, by the terms of the policy, this violation avoided the policy, both as to the stock of merchandise and as to the building. *Judge Hoke,* writing the opinion for the Court, says: "True, the amount of the insurance is apportioned, a definite sum being specified for the building, and another for the goods. It is also true that the stipulations of the iron-safe clause are more especially addressed to the insurance of the goods; but the premium on the policy is entire; the concluding stipulation is to the

effect that if the insured fails to produce the set of books and inventory as required by the contract, the policy shall become null and void, and the 'failure shall constitute a perpetual bar to any recovery thereon'; and, furthermore, the goods are insured 'while they are contained in the storehouse and not elsewhere,' thus making the risk on the goods and on the building substantially identical."

In the instant case, by its policy of insurance, defendant, for one entire premium, insured C. D. Mortt, the owner, against loss or damage, by fire, to three classes of property, to wit: (1) the store building; (2) the stock of merchandise; (3) the store furniture and fixtures, the insurance on the two last-named classes of property to be in force, only "while contained in this building." Here we have both (1) an entire premium, and (2) an identity of risk. The obligation is therefore single. It is expressly stipulated that change in the interest, title or possession of the subject of the insurance shall avoid the entire policy. The admitted violation of this stipulation rendered the entire policy void, not only as to the property, the title to which was changed by the sale and conveyance, but also as to the property, the title to which remained in the insured. The entire policy having become void, by the act of the insured, no action could thereafter be maintained by him for any recovery upon the policy. We necessarily reach this conclusion under the law as declared by this Court in *Coggins v. Insurance Company*. The law has been declared otherwise in other States and in other jurisdictions, both before and since that decision; we do not find the reasoning which has led other Courts to a different conclusion from that reached by this Court, so conclusive as to justify us in considering whether the decision of the question in *Coggins v. Insurance Company* should be overruled, and we therefore follow that decision as the law in this State. See *Joffe v. Niagara Fire Ins. Co.*, 116 Md., 155, and full note in 51 L. R. A. (N. S.), 1047. The annotator says: "The earlier cases on this subject will be found collected and discussed in the note to *Wright v. Fire Ins. Asso.*, 19 L. R. A., 211. There has been very little change in the attitude of the Courts since the publication of the earlier note, but such alteration of the views as have taken place have been in favor of the divisibility of a policy covering different kinds of property separately valued." Where the different classes of property insured by the same policy are not exposed to the identical risk, and the rate of premium on each class is determined by this fact, it may well be held, on principle, that the contract is divisible; but where the risk is identical, and the premium is entire, we hold the law to be, in this State, that the contract is indivisible.

In *Northern Assurance Co., Ltd., of London, v. Case*, decided 14 April, 1926, in the United States Circuit Court of Appeals, Fourth Cir-

cuit, a contrary view of the law is declared. Authorities are cited in the opinion in that case, written by *Parker, Circuit Judge,* in support of the decision, although it is said that some of the State Courts of high authority hold policies of insurance upon a building and its contents indivisible on the theory that there is an identity of risk. The decision of the question there presented follows the law as declared in that circuit in the opinion of *Judge Knapp,* in *Downey v. German Alliance Insurance Co.* (C. C. A., 4th), 252, Fed., 701. This decision, however persuasive the reasoning by which it is supported may be, cannot be authoritative with us. The law in this State is as declared in the opinion of *Hoke, J.,* in *Coggins v. Ins. Co., supra.*

The rights of the plaintiff in this action, however, under the policy, arise out of the assignment of the policy, by the insured, with the consent, in writing, of the insurer, dated 19 June, 1924; conceding that the entire policy was void on that date as to the insured, and that no action could have been maintained by him, on the policy, it does not necessarily follow that the policy was thereafter void as to plaintiff. The statement of the law in 32 C. J., 1314, sec. 563, is well supported by the authorities cited. It is as follows:

"As a general rule, a ground for avoidance or forfeiture of a contract of insurance which is available as against the insured may be asserted as against any third person claiming the benefits of the contract, such a third person beneficiary, or an assignee, or a creditor. Where, however, the policy has been assigned with the consent of the company in such manner as to become a new contract between the company and the assignee, it will not be avoided by misrepresentations upon the part of the original insured not material to the new agreement, nor by a subsequent breach of the policy by the assignor, and the assignee is not affected by conditions not appearing in the policy, and of which he had no knowledge."

In Vance on Insurance, p. 413, it is said: "The assignment of a fire policy before it becomes a fixed liability by the loss of the property insured can be made only with the consent of the insurer, which transforms the assignment into a novation, and eliminates any question of conflicting rights of assignor and assignee."

In *Hall v. Niagara Fire Insurance Co.* (Mich.), 18 L. R. A., 135, it was held that the assignment of an insurance policy, with the consent of the insurer, creates a new contract, between the latter and the assignee, which is unaffected by any causes of forfeiture previously existing, and unknown to either party. It has been held that acts of the assignor, prior to the assignment, by which the policy was forfeited, or became void, as to him, do not affect the rights of the assignee, even where the insurer was ignorant at the time of its consent to the assignment, of the

acts of forfeiture, or of acts which rendered the policy void as to the original insured. *Ellis v. Ins. Co. of North America,* 32 Fed. Rep., 646; *City Fire Ins. Co. v. Mark,* 45 Ill., 482; *Continental Ins. Co. v. Munns,* 120 Ind., 30, 5 L. R. A., 430. Where the insurer has knowledge of such acts, and with such knowledge consents to the assignment of the policy, to a purchaser of the property, and thereby becomes liable to him, under the policy, in the event of a loss, it is clear that an action by the assignee to recover for such loss cannot be barred by reason of any act of the assignor, prior to the assignment, although the act rendered the policy void as to him.

In the instant case, plaintiff knew of the act of the original insured, to wit, the conveyance by him of the store building, covered by the policy, which under its terms, rendered the entire policy void; she, as his wife, had joined with him in the deed conveying the property. She offered evidence, which was uncontradicted, that defendant's agent, who acted in its behalf, in consenting to the assignment, also knew of the sale of the building. The knowledge of its agent is imputed to defendant, not upon the principle of waiver—for under the terms of the policy the agent was without power to waive the forfeiture resulting from the change in title of the store building—but upon the principle of estoppel. *Johnson v. Ins. Co.,* 172 N. C., 142; *Grabbs v. Ins. Co.,* 125 N. C., 395. Defendant, with knowledge that the entire policy was void on 19 June, 1924, consented to its assignment to plaintiff, and retained the unearned portion of the premium. It cannot be supposed that defendant consented to the assignment of a policy which it knew to be void and retained the unearned portion of the premium on a policy under which it had no liability to the assignee, the owner of the property insured by the policy. *Forward v. Ins. Co.,* 142 N. Y., 387. However this may be, we hold that defendant cannot now resist recovery by plaintiff upon the facts, as the jury must have found them, if they believed the evidence. The judgment is affirmed. There is

No error.

GEORGE VANCE FOWLER, BY HIS NEXT FRIEND, W. N. FOWLER, v. CAROLINA CROSS ARM AND CONDUIT COMPANY.

(Filed 27 May, 1926.)

1. Negligence—Master and Servant — Employer and Employee — Safe Place to Work—Safe Instrumentalities.

The master is not liable in damages to its servant for his failure to furnish the latter reasonably safe instrumentalities to perform his duties within the scope of his employment, in the absence of actual or con-

structive notice of the defect; or unless through its vice-principal, it has negligently instructed the servant to do the work under an assurance of safety, or where the negligence complained of is not the proximate cause of the injury alleged.

2. Master and Servant—Employer and Employee—Negligence—Duty of Master.

The master in the performance of his duty to furnish reasonably safe platforms for his servant to unload lumber, etc., from a railroad car, coming within the scope of the latter's duties, is held to the exercise of ordinary care in selecting material reasonably suitable and safe for its construction, and like care in its construction and inspection, without the power to delegate this responsibility to other servants so as to avoid its liability.

3. Same—Evidence—Nonsuit.

Where there is evidence only that the master's vice-principal has instructed an eighteen-year-old employee in his absence to unload lumber with other employees from a railroad car in the manner in which the employees had experience, by means of a temporary unloading platform to be constructed of plank and sills, but only for transferring the timber (railroad sills) from the cars, without evidence of any defect in the material used in this platform, and the employee's injury is caused by his attempting to pile the lumber on this platform of considerable weight instead of transferring it, as was the invariable custom: *Held*, insufficient evidence as to the negligent failure of the master to furnish proper instrumentalities, and defendant's motion for judgment as of nonsuit should have been granted.

4. Negligence—Master and Servant—Employer and Employee—Infants—Courts—Questions for Jury.

It will not be held as a matter of law under the facts of this case, that an eighteen-year-old lad, of experience in such matters could not be considered capable of constructing a temporary platform for the unloading of lumber or sills from a railroad car.

CIVIL ACTION, tried before *Lyon, J.*, at December Special Term, 1925, of MECKLENBURG.

The plaintiff, a boy about eighteen years of age, was employed by the defendant as a general laborer or utility man, doing anything that "came along; whatever they wanted me to do." He had been working for the defendant about six or eight weeks before his injury. He alleged that on or about 30 September, 1924, he was seriously and permanently injured by the fall of a platform, while engaged in the line of his duty and in executing the orders of the foreman to unload a car of lumber. The car of lumber in question was pulled up opposite defendant's building. In order to unload the car it was necessary to build or lay a platform from the platform of the building to the door of the car, a distance of six or eight feet.

The plaintiff testified as follows: "On Saturday morning Mr. Stills (foreman), told us not to come back Monday morning to work, but to come back Tuesday morning, and there would be a car of lumber there to be unloaded. If he did not come in Monday he would be there Tuesday. He just told us to unload the car of lumber. He told us where to unload it; in the same place we had always unloaded it. There was not any other place for unloading it. We ordinarily unloaded the lumber right at the rear end of the building. There was a platform there part of the way; wasn't one all the way. We had to build it from the platform of the building out to the car; that was about six feet I reckon. The instructions he gave us for unloading the lumber were, he just told us to unload it there until he came, and in the same place, and use the same stuff we had been using. That was all we had to use. We had been using in unloading just 4 x 4, that we used at this time. There were four pieces used. We laid one end of this lumber on the platform that was in the building and took these little dinky crossties and put them up at the other end; stacked them up on top of each other, made a pile, and laid the 4 x 4 from the platform on the building out on that to make it level. . . . We placed them on this occasion just exactly in the same manner in which we had placed them theretofore. Used the same material all the way around. Used the same number of pieces that we ordinarily used. Hilton and me and the two Barrett boys made the scaffold. We went in there that Tuesday morning and made this scaffold the first thing, the platform that we were piling on. We could put half or two-thirds of the lumber back in the building before we started to put it on the platform that run out from the building. . . . The scaffold under the platform on which I was standing broke and the platform broke."

Plaintiff further testified that about two-thirds of the car of lumber had been placed inside the building, and practically all of the remaining third was piled upon this platform at the time it fell. The exact words of the plaintiff were: "We had right around one-third of a carload, hardly one-third out there. We had no idea of building it for the purpose of stacking lumber on it for long. We had never stacked any lumber on it out that far. Me and Hilton and those two Barrett boys built the platform. I don't remember who picked out the lumber. It was what we had used all the time, 4 x 4, because that is what we had the planer set for when they were planing them. We had used the same skids late the day before. . . . I mean by dinky crossties, short crossties for a little railroad. . . . The condition of those pieces of 4 x 4, the pieces of lumber that were put out there, was good; looked to be."

There was evidence tending to show that the third of the carload of lumber which was loaded on the platform would weigh about twenty-eight thousand pounds; and the contention of the defendant was upon all the evidence, that the platform fell or broke not by reason of any defect, but because the plaintiff and his colaborers had placed more weight upon the platform than it could bear, it being only designed as a temporary structure for unloading cars, and to be used chiefly as a walkway and not a loading platform.

Issues as to negligence, contributory negligence, assumption of risk and damages were submitted to the jury and answered in favor of the plaintiff, awarding damages in the sum of $7,000. From judgment thereon defendants appealed.

J. F. Flowers, Marvin L. Ritch for plaintiff.
J. Laurence Jones, James A. Lockhart for defendant.

BROGDEN, J. The only exception requiring discussion is whether or not there was sufficient evidence of negligence to be submitted to the jury. If so, there is no reversible error, and the judgment should be upheld. If not, the judgment of nonsuit should have been sustained.

The liability of an employer for injuries to his employees, occasioned and brought about from the use of instrumentalities used in the work, has created a broad field of judicial inquiry. An examination of the authorities will disclose that liability results from the application of the following principles, to wit:

(1) The instrumentality must be defective. *Aiken v. Mfg. Co.,* 146 N. C., 324; *Barkley v. Waste Co.,* 147 N. C., 585; *Yarborough v. Geer,* 171 N. C., 334; *Vogh v. Geer,* 171 N. C., 672; *Howard v. Wright,* 173 N. C., 339; *Winbourne v. Cooperage Co.,* 178 N. C., 88; *McKinney v. Adams,* 184 N. C., 565.

(2) The employer must know of the defect, or be negligent in not discovering it and making the needed repairs. *West v. Tanning Co.,* 154 N. C., 44; *Reid v. Rees,* 155 N. C., 230; *Wright v. Thompson,* 171 N. C., 91.

(3) If the employer gives assurance that the instrumentality is safe. *Atkins v. Madry,* 174 N. C., 187; *Smith v. R. R.,* 170 N. C., 184; *Rogerson v. Hontz,* 174 N. C., 27.

(4) If the work is done under the supervision of the employer and according to his instructions. *Thompson v. Oil Co.,* 177 N. C., 279; *McKinney v. Adams,* 184 N. C., 565; *Hairston v. Cotton Mills Co.,* 188 N. C., 557.

(5) If the employer, having either express or implied notice of a defect, promises to repair or to procure a reasonably suitable instrumentality. *Whitt v. Rand,* 187 N. C., 807.

The case now under consideration involves the breaking or falling of a platform. The law of negligence, as applied to platforms and ladders, is discussed in the following cases: *Aiken v. Mfg. Co.,* 146 N. C., 324; *Barkley v. Waste Co.,* 147 N. C., 585; *West v. Tanning Co.,* 154 N. C., 44; *Reid v. Rees,* 155 N. C., 230; *Pearson v. Clay Co.,* 162 N. C., 224; *Smith v. R. R.,* 170 N. C., 184; *Yarborough v. Geer,* 171 N. C., 334; *Vogh v. Geer,* 171 N. C., 672; *Howard v. Wright,* 173 N. C., 339; *Lagler v. Roch* (Ind.), 104 N. E., 111; *Colford v. New England Structural Co.* (Mass.), 91 N. E., 409; *Berg v. Pittsburgh Construction Co.,* 128 Minn., 408; *Nevin v. William Grace Co.,* 165 Ill. (App.), 259.

The principles of liability growing out of the use of scaffolds, platforms and walkways, as declared by the decisions of this Court, are as follows: (1) The employer must exercise ordinary care in selecting materials reasonably suitable and safe for the construction of such instrumentalities; (2) ordinary care must be exercised in the construction and inspection thereof; (3) if the employer delegates the construction of such instrumentalities to one of his employees, he is responsible for the manner in which this duty is discharged, and the employee using such instrumentality has a right to assume that the employer has exercised due care both in the selection of proper materials and in the construction of the instrumentality.

The evidence has been set forth at length and a scrutiny of the testimony will disclose the following facts:

(1) There is no evidence of any defect in the material furnished for the construction of this platform; (2) the plaintiff and his helpers built the platform themselves, according to their own judgment and without any suggestion or control of the employer, it appearing that the foreman was absent at the time the platform was constructed; (3) that the plaintiff had used the same material for unloading purposes on the previous day; (4) that the platform was not built for the purpose of stacking lumber on it permanently; (5) that more lumber had been put out on this platform on this particular occasion than at any other time; (6) that this lumber was being unloaded in the usual way and that plaintiff had been working at the plant for about six weeks.

In our examination of the authorities in this State relating to ladders, platforms and walkways, there is found no direct decision dealing with the question of a platform or walkway actually constructed by the party injured, and the effect this would have upon his right to recover. There is, however, in several of the cases referred to, statements to the

effect that the party injured had no part in constructing the instrumentality causing the injury. These intimations are strong and suggestive; and, while it may be urged that they involve only negative reasoning, there are cases in other jurisdictions expressly holding that where the injured party himself constructs the platform causing the injury, in his own way and the employer has exercised due care in furnishing reasonably fit and suitable materials therefor, no recovery can be allowed. The principle is thus declared in *Lagler v. Roch, supra* (Ind.), 104 N. E., 111: "When the master in person or by another, provides or undertakes to build for the use of his servants a scaffold or like structure, and turns it over to such servants in a completed or supposedly completed state for their use in prosecuting their work for the master, it is undoubtedly his duty to exercise reasonable care to see that it is reasonably safe for the contemplated purposes. But, where the master has used reasonable care in the selection of materials from which to erect such a structure with the design and purpose that the servants shall build it for their own use, and where the servants with knowledge of such purpose and design erect such structure from such material in such a manner as their own judgment dictates to them, the master having no direction or control of such construction, he cannot be held liable for injury sustained by one of such servants by reason of defects in such structure growing out of the manner of the construction thereof." In this case the plaintiff was a boy seventeen and a half years old, who, together with another, built a platform and failed to fasten the planks. The planks slipped, causing injury.

Of course, it must be conceded that the age and experience of a plaintiff and his capacity to observe and appreciate danger, must be considered in applying the rules of liability for injury in such cases. This rule has been pointed out and discussed in many of the cases referred to. There is no evidence in this record that the plaintiff was inexperienced in unloading cars of lumber, or that he did not possess the capacity to reasonably apprehend and appreciate any danger that might be incident thereto. Certainly, it cannot be held, as a matter of law, that an eighteen-year-old boy does not possess such capacity.

The plaintiff in this case is seriously and permanently injured, and his injuries naturally incite in any normal person the deepest feeling of sympathy; but it is the duty of the courts to apply the law as it is written, and we must therefore hold that the motion for nonsuit should have been granted.

Reversed.

STATE v. ALVIN MANSELL.

(Filed 27 May, 1926.)

1. Rape—Alibi—Evidence—Identification.

Where the defense of an alibi is relied upon on a trial for rape, where the prosecutrix has positively identified the prisoner as the man who committed the assault upon her, it is competent as *pars rei gestæ* for her to testify that shortly theretofore she had seen the prisoner slinking along the country road she was walking towards the scene of the crime, and that she said to herself, "I wonder why that negro is looking at me that way," identifying by her positive evidence this negro as the one who shortly thereafter committed the assault upon her.

2. Same—Evidence—Corroborative Evidence.

Where the identity of the prisoner is controlling in an action for rape, and the prosecuting witness has testified thereto, it is competent for the sheriff to testify as corroborative evidence former occasions, after the offense had been committed, on which in his presence the prosecutrix had identified the prisoner as the one who made the assault.

3. Same.

Upon the question of identity of the prisoner on trial for rape and assault, where the other evidence is sufficient thereon, it is competent for a witness to testify that he had several times before the commission of the offense seen the prisoner "slinking" along the road in that locality, as tending to show the prisoner knew the place, etc., along with the other evidence tending to establish his identity.

4. Appeal and Error—Prejudice—Evidence—Questions and Answers—Rape—Identity of Prisoner—Alibi.

Upon the question of the identity of the prisoner on trial for rape, a question and answer thereto is not prejudicial error, or should be stricken from the record on defendant's motion, when by the use of the word "there" the place of the crime was made clear by the other evidence addressed upon the same cross-examination, so that the jury could not have misunderstood it.

5. Instructions—Courts—Expression of Opinion—Statutes—Evidence—Questions and Answers—Appeal and Error.

Where upon the trial of a capital felony the same witness has several times fully answered a question of the defendant's attorney, it is within the discretion of the trial judge in order to expedite the trial, to relieve the witness of answering substantially the same question; and his statement before the jury that the witness had already fully answered, is not an expression of his opinion upon the weight and credibility of the witness, inhibited by statute.

6. Courts—Military—Safety of Prisoner—Prejudice—Appeal and Error—Objections and Exceptions.

Where for the protection of the prisoner on trial for rape, unexcepted to at the time, the military authorities, under the Adjutant General, has

quietly placed soldiers in the courtroom, and without the knowledge of the jury, have had all present examined for concealed weapons, and excluded a general attendance of the public, not connected with the case: *Held*, the prisoner's exception thereto thereafter, is untenable.

APPEAL by defendant from *Stack, J.*, at November Special Term, 1925, of BUNCOMBE. No error.

Indictment for rape. Verdict: Guilty. From judgment, that defendant suffer death, by means of electrocution, as provided by statute, defendant appealed.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

A. Hall Johnston for defendant.

CONNOR, J. There are no exceptions to the evidence, offered by the State, to sustain its contention that the crime was committed as alleged in the indictment. There was evidence that the prosecutrix had been married about seven years, and lived with her husband, near the city of Asheville; that she had been the mother of four children, all of whom are dead; that she is not strong, physically. Many witnesses testified that they had known her for many years, and that they knew her general character; that it was good. There was no evidence or contention to the contrary. Her testimony, as to the time and place of the assault, and both as to the purpose of her assailant, and as to the result accomplished by him, was fully corroborated by many facts and circumstances, with respect to which there was no controversy on behalf of defendant.

There are no exceptions to the instructions of his Honor, in his charge to the jury, as to the law applicable to the evidence, tending to show that the prosecutrix was the victim of the crime, for which defendant was on trial. These instructions are clear, full and accurate. It is manifest that his Honor felt keenly the grave responsibility which was imposed upon him as the presiding judge at this trial, in which the issue involved, not only the peace and dignity of the State, and the protection of her citizens, but also the life and death of defendant. There were no requests for special instructions; no contention is made, by the learned and zealous counsel, who was assigned by the court, to aid the defendant upon his trial, and who appeared for him, upon his appeal in this Court, that there was any error of law, or of legal inference, with respect to this aspect of the case, to be presented to or passed upon by this Court.

Defendant denied that he is the man who committed the crime, for which he has been convicted by the jury. His defense is an alibi. He

contends that upon all the evidence the jury should have had, at least, a reasonable doubt as to the truth of the State's contention that he is the man who committed the crime. He complains that evidence relied upon by the State to sustain this contention was erroneously admitted by the court.

The prosecutrix testified that she first saw defendant, on the day upon which the crime was committed, sweeping the sidewalk, with a broom, at Fairview Cottage, where she had gone, early in the morning, as was her custom, to sell to patients at the cottage, wild flowers gathered by her on the mountain side. She was across two roads from defendant, up a little trail. She noticed him "because he made a racket down there, and was looking up at me. He did not speak, and I did not speak to him. I said to myself, 'I wonder what in the world that negro is looking at me for.'" Defendant's counsel promptly moved that this last statement by the witness be stricken from the record, and excepted to the refusal of the court to allow the motion. This exception cannot be sustained. It was competent to be considered by the jury as evidence tending to show the circumstances under which the witness first saw defendant, that morning, for the purpose of enabling the jury to determine both the credibility and weight of the witness' testimony identifying defendant as the man who, shortly thereafter, assaulted her on the mountain side, about a mile and a quarter from Fairview Cottage. Defendant admits that he was sweeping with a broom, at Fairview Cottage and that he saw prosecutrix there that morning, as she testified. Evidence of the impression made upon witness at the time was competent as *pars rei gestæ*. What she said to herself relative to defendant's manner is not only evidence of the extent to which she observed defendant at the time, but also tends to show that defendant was observing her. If she had made the statement to another, at the very time, it would have been competent. *Young v. Stewart,* 191 N. C., 297.

After defendant was arrested by the sheriff, during the afternoon of the day on which the crime was committed, he was taken into the presence of prosecutrix at the hospital. The sheriff testified that he went to prosecutrix's room, accompanied by defendant, another colored man, and three deputies; that when he got into the room, about a third of the way, the prosecutrix raised herself up from her bed, and said, "Sheriff, you have got him; that's him, that's him, that's him." Prosecutrix had testified that defendant was the man who had assaulted her; that she saw him plainly, and looked into his face, and knew that defendant was the man who had assaulted her the moment he came into the room. "He is the man who assaulted me and raped me. He certainly is the man, sitting right over there. I knew him when they brought him in here the other day. I can't be in doubt about it." De-

fendant excepted to the testimony of the sheriff as to statement made to him by prosecutrix. The court instructed the jury that this statement was not substantive evidence, but was to be considered by the jury merely as corroborative evidence. Defendant's assignment of error based upon this exception cannot be sustained. The sheriff further testified, "I stepped to the right and said to her, 'The large one or the small one?' She said, 'The small one.' This boy, standing kind of between me and her in bed, began to cry. I was on her left, and she said, 'You pretty nigh killed me.' The boy said, 'I was just telling you about them flowers.'"

Kelsey Bartlett, witness for the State, testified that he lives on Sunset Mountain, and knows prosecutrix. He knows the road upon which it is alleged the assault was made. He crosses it twice a day, going to and from his work. On several occasions he has seen a colored man "slinking along the road" in the evening. "I have looked at this defendant since he has been in court. I am confident that he is the man I have seen." Defendant excepted to this testimony. While the probative force of this testimony is not great, it cannot be held error to submit it to the jury, as tending to show that defendant had been on this mountain road, and knew the road. Assignments of error Nos. 6, 7, 8 and 9 based upon exceptions to this testimony cannot be sustained.

R. H. Luther, witness for the State, testified that he was in jail, on business, when defendant was brought in after his arrest. Witness testified, "I asked defendant where he was from; he said from South Carolina. I then asked him what he was doing out there where this woman was; he said he was just out there. He told me that, a couple of times, that he was just out there. I was talking to him about where the woman was hurt, that is what I meant." Exceptions to this testimony were properly overruled. It is true that it was for the jury to determine to what place witness referred in his question to defendant and to what place defendant understood witness to refer when he answered the question. Surely the jurors, as intelligent men, understood this. There was at least no prejudicial error in refusing to sustain defendant's objection to the testimony.

Prosecutrix testified that while she was returning from Fairview Cottage to her home, on the mountain side, on the morning of 19 September, 1925, walking along the road alone, a negro man passed her. She stooped to tie her shoe and the man passed on out of her sight. In a few moments, the man came back, with a rock in his hand, manifesting by his conduct a purpose to assault her. He rushed upon and knocked her down. This was immediately before the first assault. She testified that after the last assault, she became unconscious, as the result, partly, of

the blows which he inflicted upon her head with the rock. When she regained consciousness, her assailant had gone.

On cross-examination, counsel for defendant asked her the following questions:

"Q. About how much time, now, if you can make an estimate of it—I know it seemed to you like a longer time than it was, maybe, but about how long would you say it was from the time that negro came back down the road and met you that way down the road and assaulted you, until you became unconscious and he ran off?"

The witness replied:

"A. I can't tell you, Sir; I aint got no idea; I aint going to say, because I don't know."

"Q. Give us your best judgment of it?"

"A. I aint got no idea at all; I couldn't say."

By the court: "She says she has no idea at all; that is a complete answer."

Defendant excepted to the statement of the court, contending that this was an expression of an opinion by the court that the witness had testified truthfully. Defendant's construction of the court's statement, as same appears in the record, cannot be sustained. It is manifest that the court meant only that the answer was final, and that the question should not be repeated. This assignment of error cannot be sustained. It is both the right and the duty of the presiding judge to control the examination and cross-examination of witnesses, both for the purpose of conserving the time of the court, and for the purpose of protecting the witness from prolonged and needless examination. The exercise of this right and the performance of this duty should not be construed as a criticism of counsel, who must perform their duty and exercise their rights as they deem proper. There should be, and in this instance there was, no conflict between the respective rights and duties of judge and counsel. The witness, having stated several times that she had no opinion as to the matter involved in counsel's questions, it was proper for the court to suggest to counsel that her answer to his question was complete and final. Defendant was not prejudiced by the statement of the court, for the jury could not have understood such statement to be an opinion of the judge as to the truthfulness of her answer.

Defendant further excepted for that the court ordered the Adjutant General of the State who was present, with members of the State militia, at the trial under orders of the Governor, to conduct defendant into the courthouse, and to station the said members of the militia inside the bar and in various places in the courthouse, where they remained during the trial, in the presence of the jury. It does not appear from the record why this was done, further than it was done for the protection

of the defendant, and to insure him a fair trial. It appears from the record that the court also ordered that the court room be vacated and that all persons, coming into the room be searched for fire arms. These orders were not given in the presence of the jury. Defendant excepted.

Assignments of error based upon these exceptions cannot be sustained. If either the Governor or the judge had reason to apprehend that demonstrations unfavorable to the prisoner might occur, or that the prisoner was in danger because of popular excitement or indignation at the crime for which defendant was on trial, it was not only proper, but their duty to take precautions for the safety of the prisoner and the protection of the court. No objection was made by the defendant, or on his behalf to these orders at the time they were made. It does not appear that he was prejudiced thereby.

The State's evidence tended to show that the crime was committed between 8 and 9 o'clock in the morning. Defendant offered evidence from which he contended that the jury should have found that he was at work at Fairview Cottage during all the day from about 7 o'clock a. m. until about 3 p. m., and that he was no nearer the scene of the crime than a mile and a quarter. All this evidence was submitted to the jury, under instructions of the court, to which there are no exceptions.

After all, the issue involved chiefly the identity of defendant as the man who committed the crime. The prosecutrix, a woman of good character, was positive in her testimony identifying the defendant as her assailant; she was corroborated, and the jury has said by the verdict, that defendant is guilty. We find no errors of law or legal inference, and the judgment must be affirmed.

No error.

BROWN v. SOUTHEASTERN EXPRESS COMPANY.

(Filed 27 May, 1926.)

1. Carriers—Negligence—Evidence—Burden of Proof—Transportation—Damages—Prima Facie Case.

In order to recover of a common carrier damages to a shipment of goods, the plaintiff must show the carriers' assumption of the obligation to transport and deliver, expressed or implied, and a failure in this duty by the carrier, i. e., nondelivery or delivery under its contract in a damaged condition, and thereupon the plaintiff has made out a prima facie case.

2. Same—"Good Condition"—Presumptive Evidence.

The formal receipt of the consignment of goods by the common carrier is presumptive evidence of its good condition, in the absence of notation or entry thereon to the contrary.

CIVIL ACTION tried by *Bryson, J.*, at November Term, 1925, of CHEROKEE.

This action was originally instituted in a court of the justice of the peace against the American Railway Express Company and the Southeastern Express Company to recover $81.80 for damage to a shipment of pork from Madisonville, Tennessee, to Andrews, North Carolina. The plaintiff moved from Madisonville to Andrews, leaving some of his hogs in Tennessee. Later he directed these hogs to be slaughtered and shipped to him at Andrews. The hogs were delivered to the defendant in Madisonville on 16 January, 1924, in the morning about 9:00 o'clock a. m., and arrived at Andrews on 17 January about 1:34 p. m. There was no question of delay in shipment. The hogs were shipped in an express and baggage car which was the usual way of shipping property of this character. Upon arrival at Andrews the meat was tainted, "felt warm and had an odor," and the plaintiff offered evidence tending to show that the shipment was an entire loss.

Upon issues duly submitted to the jury, there was a verdict for plaintiff for $75.75, from which judgment on the verdict the defendant appealed.

D. H. Tillett and D. Witherspoon for plaintiff.
Dillard & Hill for defendant.

BROGDEN, J. The determination of the merits of this controversy depends upon whether or not it was incumbent upon the plaintiff to offer evidence tending to prove that the hogs were originally delivered to the defendant in good condition. In *Hosiery Co. v. Express Co.*, 184 N. C., 480, *Stacy, J.*, declares the law to be: "In an action against a common carrier to recover for the loss of or damages to a shipment of goods, the plaintiff must show: (1) delivery of goods to the carrier; (2) an undertaking on his or its part, express or implied, to transport them; and (3) a failure to perform his or its contract or duty, *i. e.*, nondelivery, of the goods or delivery in a damaged condition. The plaintiff has a prima facie case when he shows the receipt of the goods by the carrier (as such), and their nondelivery or delivery in a damaged condition. But until this much is established the carrier is not required to offer any evidence."

It will be observed that this is a suit by the consignee who lived in North Carolina, and who was the owner of the property. "Among

connecting lines of common carriers, that one in whose hands goods are found damaged is presumed to have caused the damage, and the burden is upon it to rebut the presumption." *Mfg. Co. v. R. R.*, 121 N. C., 514; *Hinkle v. R. R.*, 126 N. C., 937.

The plaintiff introduced in evidence an express receipt issued by the defendant, as follows:

"1-17-24.

"Mr. R. H. Brown,
"Andrews, N. C.

"To Southeastern Express Co., Dr. (Incorporated).

"For transportation of the following described shipment: Waybill No. 6648; date 1-16-24; article and value: 2 D. hogs; weight 505; shipper Chas. Burrus; point of origin, Madisonville, Tenn. Total charges $6.01. Received payment, J. A. Morgan."

Conceding that it was incumbent upon the plaintiff to offer evidence tending to show that the property was originally delivered to the carrier in good condition, the express receipt or bill of lading is evidence of the fact that the merchandise was delivered in good condition in the absence of notation or entry thereon to the contrary. This rule of evidence was expressly declared in *Sumrell v. R. R.*, 152 N. C., 269, as follows: "The court properly refused the defendant's prayer for nonsuit, and also to charge that there was no evidence that the goods were delivered in good order to the defendant. The bill of lading raised the presumption."

No error.

JOHN EARWOOD, ADMINISTRATOR OF GORDON EARWOOD, v. SOUTHERN RAILWAY COMPANY ET AL.

(Filed 27 May, 1926.)

1. Carriers—Railroads—Negligence—Evidence—Grade Crossings — Signals.

The running of a railroad train at an excessive speed across a public road grade crossing of a town without timely warning by blowing the whistle of the locomotive, is evidence of its actionable negligence in an action by a passenger in an automobile against the company, or by his administrator for his wrongful death.

2. Negligence—Automobile Passenger.

The negligence of the driver of an automobile is not attributable to a mere passenger who is not engaged with him in a common enterprise, and who has no control over the operation of the automobile.

3. Same—Carriers—Railroads—Grade Crossings—Evidence—Proximate Cause—Questions for Jury.

When a passenger in an automobile is killed in a collision at a public highway grade crossing of a railroad track in a town, and the negligence of the driver of the automobile is not attributable to him, and there is evidence of negligence on the part of the driver and on the part of the engineer and crew on the railroad company's train, in an action against the railroad company for the wrongful death of the passenger, the issue of the defendant's negligence is for the jury upon the question of the proximate cause.

4. Negligence—Concurrent Negligence—Proximate Cause.

In an action against a railroad company for damages for the negligent killing of the plaintiff's intestate, while the defendant is not liable if the independent negligence of another is the sole, efficient, and proximate cause, the defendant is liable if its negligence contributed as the proximate cause to the injury complained of.

ACTION for damages for wrongful death, tried before *Bryson, J.*, at November Term, 1925, of CHEROKEE.

Graham Street in the town of Andrews runs approximately north and south, and intersects the line of the Southern Railway from Asheville to Murphy, at right angles, within the corporate limits of said town of Andrews. On the north side of the railroad right of way and on the east side of Graham Street there was a baseball ground enclosed with a fence ten or twelve feet high. The fence of the baseball park runs parallel with the railroad, and said fence is also parallel with the eastern side of Graham Street.

On Sunday, 28 September, 1924, Albert Wakefield was driving an automobile from the Government Armory, which is situated on the north side of the track of the defendant railway, and going to his dinner. His wife was on the front seat with him, and plaintiff's intestate, Gordon Earwood, was riding with him on the back seat of the car. Wakefield drove the car into Graham Street, and then proceeded along Graham Street south across the track of the defendant. The evidence tended to show that he did not slacken the speed of the car or stop the same before reaching the track of the defendant, but drove straight ahead at a rapid rate of speed upon said track. Defendant's passenger train was then approaching the crossing, and said passenger train struck said automobile, killing all of the occupants thereof.

There was evidence tending to show that Graham Street was a much used street, and that the passenger train of the defendant was negligently operated at the time, in that it approached said crossing ahead of its schedule, running at an unusually rapid rate of speed and without blowing the whistle or ringing the bell or giving any notice whatever of its approach to said crossing. There was much evidence offered

by the defendant to the effect that the whistle was blown, and that the bell was ringing at the time of the collision. There was also strong evidence offered by the defendant by several disinterested witnesses that Wakefield, the driver of said car, approached said crossing at a very rapid and unlawful rate of speed and drove upon said crossing without stopping or in any way slackening the speed of the automobile. There was testimony on behalf of the plaintiff by eye witnesses to the killing that they heard no whistle blow, and that no bell was rung by the defendant, and that they were in a position where they could have heard such signals.

The usual issues of negligence, contributory negligence and damages were submitted to the jury. The jury found that the defendant was guilty of negligence, and that the plaintiff's intestate was not guilty of contributory negligence, and awarded damages in the sum of $7,000.00.

From judgment upon the verdict the defendant appealed.

Moody & Moody for plaintiff.
Thomas S. Rollins for defendant.

BROGDEN, J. The crossing in controversy was a grade crossing, and, according to the evidence, one that was much used by the public. It was therefore the duty of the defendant to use due care in giving a timely warning of the approach of its train either by sounding the whistle or ringing the bell at the usual and proper place in order that those approaching or using the crossing could be apprised that the train was at hand. It is established law that failure to perform this duty constitutes negligence. *Edwards v. R. R.*, 132 N. C., 100; *Bagwell v. R. R.*, 167 N. C., 611; *Goff v. R. R.*, 179 N. C., 216; *Pusey v. R. R.*, 181 N. C., 137; *Williams v. R. R.*, 187 N. C., 348.

There was sufficient evidence to be submitted to the jury as to the failure of defendant to give reasonable and timely notice of the approach of the train. The principle of law involved is thus stated in *Perry v. R. R.*, 180 N. C., 290. "It was the duty of the defendant to give reasonable and timely notice of the approach of its train to a public crossing by ringing the bell or blowing the whistle, or by doing both when peculiar conditions demanded it; that a failure to do so is negligence, and that the evidence of witnesses nearby who testify that they do not hear the ringing of the bell or the blowing of the whistle, is evidence that no such signal was given," (citing *Goff v. R. R.*, 179 N. C., 219).

The evidence of the defendant tends to show that Wakefield, the driver of said car, was guilty of gross negligence, but this negligence would not be imputed to plaintiff's intestate, who was a mere guest or

passenger in the car at the time of the collision, because there is no evidence that plaintiff's intestate was engaged in a joint enterprise with the driver, Wakefield, or that he had any control whatever of the car, or that he failed to perform any duty imposed by law upon him as a guest or gratuitous passenger. Therefore, negligence on the part of the driver will not, ordinarily, be imputed to a guest or occupant of an automobile unless such guest or occupant is the owner of the car or has some kind of control of the driver. *Bagwell v. R. R.,* 167 N. C., 611; *White v. Realty Co.,* 182 N. C., 536; *Williams v. R. R.,* 187 N. C., 348; *Albritton v. Hill,* 190 N. C., 429. Of course, if the negligence of the driver is the sole, only, proximate cause of the injury, the injured party could not recover. This rule is not based upon the idea of contributory negligence on the part of the injured party but rather upon the idea that the party causing the injury was not guilty of any negligence, which was the proximate cause thereof. However, in the present case, there was evidence tending to show negligence on the part of the defendant in failing to give reasonable signals as required by law. There was also evidence that the driver of the car was guilty of negligence. Under this aspect of the case the doctrine of concurrent negligence applies, as stated, by *Stacy, J.,* in *White v. Realty Co.,* 182 N. C., 536, as follows: "But if any degree, however small, of the causal negligence, or that without which the injury would not have occurred, be attributable to the defendant, then the plaintiff, in the absence of any contributory negligence on his part, would be entitled to recover; because the defendant cannot be excused from liability unless the total causal negligence, or proximate cause, be attributable to another or others. When two efficient, proximate causes contribute to an injury, if defendant's negligent act brought about one of such causes, he is liable." *Wood v. Public Service Corp.,* 174 N. C., 697; *Hinnant v. Power Co.,* 187 N. C., 288; *Albritton v. Hill,* 190 N. C., 429.

It is too well settled to require debate that the question of the proximate cause of an injury is for the jury. *Newton v. Texas Co.,* 180 N. C., 561; *Albritton v. Hill,* 190 N. C., 429.

The jury, acting upon competent evidence and under an able and exact charge, as to the principles of law involved, has determined the facts in controversy in favor of the plaintiff, and the judgment rendered upon the verdict must be affirmed.

No error.

HAMBLEY & COMPANY v. H. W. WHITE & COMPANY.

(Filed 27 May, 1926.)

1. **Attachment—Courts—Priority—Jurisdiction—Priority of Levy — Injunction.**

One claiming paramount right to property taken in attachment should assert it in court first acquiring jurisdiction, and where several attachments have been levied on the same property, under writs issued by a number of Superior courts, it is within the power of the court, first acquiring jurisdiction by seizure, to require the questions of priority to be determined in that court.

2. **Same—Simultaneous Levies.**

Where two or more attachments against a fund in the hands of a garnishee are delivered to the sheriff at the same time, and served simultaneously, and the fund is insufficient to pay all of the attaching creditors according to their priority of levy, the funds remaining after the satisfaction of all the prior attachments, if any, will be applied pro rata among those whose attachments have been thus simultaneously executed.

3. **Same—Sheriffs.**

The sheriff upon the service of various attachments against the same property takes possession thereof and acquires a special interest therein enforceable by him for the protection of the attaching creditors in accordance with the priorities of their levies.

4. **Garnishment—Parties—Motions—Distribution of Funds.**

Where several attachments have been levied, garnishee, in each succeeding case, should set up prior attachments and notify adverse claimants to come in by intervention and set up claims to property attached.

APPEAL by several of the defendants from *Lane, J.*, at October Term, 1925, of ROWAN.

Civil action brought by plaintiffs, cotton brokers in North Carolina, against the defendants, cotton shippers of Tennessee, to recover damages in the amount of $2,840.00 for alleged breaches of contracts, arising out of agreements and transactions had between the parties.

This suit was started 15 April, 1925, in Rowan Superior Court, and a warrant of attachment issued to the sheriff of Alexander County, who, by virtue of said writ, attached the proceeds of two sight drafts, as the property of the defendants, in the hands of the Bank of Alexander, one in the sum of $7,402.19, now claimed by the First National Bank of Jackson, Tenn., and the other in the sum of $6,582.50 claimed by the Second National Bank of Jackson, Tenn., the two drafts making a total of $13,984.69. At the same time the Bank of Alexander was summoned as garnishee, as provided by C. S., 819.

Thereafter, the Spray Cotton Mills, in Rockingham County, on 23 or 24 April, 1925, the Victory Manufacturing Company, in Cumberland

County, on 21 September, 1925, the J. M. Odell Manufacturing Company, in Chatham County, on 21 September, 1925, the Wennonah Cotton Mills, in Davidson County, on 21 September, 1925, the Leward Cotton Mills, in Randolph County, on 22 September, 1925, the Randolph Mills, Inc., in Randolph County, on 22 September, 1925, and the Arista Mills Company, in Forsyth County, on 28 September, 1925, each instituted suit against the defendants, for alleged breach of contract, in the Superior Court of the county mentioned, on the date designated, and issued a writ of attachment to the sheriff of Alexander County, who, by virtue of said writs, attached the funds in the hands of the Bank of Alexander as the property of the defendants, and the Bank of Alexander was duly summoned as garnishee, in each case, as required by law.

In the suit of Spray Cotton Mills against the defendants, instituted in Rockingham County, the plaintiffs in addition to attaching the funds in the hands of the Bank of Alexander, also attached 84 bales of cotton under a separate writ issued to the sheriff of Rockingham County.

On 24 June, 1925, the Second National Bank of Jackson, Tenn., with leave of the court, intervened in the present suit and the one instituted by the Spray Cotton Mills, claimed title to the proceeds of the draft, amounting to $6,582.50, and was allowed to take the same upon filing satisfactory bond in this action to stand in lieu thereof.

All of the actions, above mentioned, are pending in the Superior Courts of the respective counties, without personal service on the defendants, but only service by publication and attachment in each case. They all grew out of sales of cotton made through plaintiffs, Hambley & Company, as brokers or agents of the defendants, H. W. White & Company.

On 27 July, 1925, the First National Bank of Jackson, Tenn., instituted an action in the District Court of the United States for the Western District of North Carolina against the Bank of Alexander, claiming title to the proceeds of the draft amounting to $7,402.19.

On 14 October, 1925, the Bank of Alexander, garnishee in all the cases, and the Second National Bank of Jackson, Tenn., intervener in two, after notice duly given, made a motion that all the plaintiffs in the various suits above mentioned be made parties to this action pending in the Superior Court of Rowan County and that the then said parties, plaintiffs in the various suits, be enjoined from proceeding otherwise against the funds here in controversy, and which were first attached in the present suit; and further that the First National Bank of Jackson, Tenn., be made a party defendant and brought in by publication. The amounts demanded in all the suits, if allowed, will exceed, in the aggregate, the funds attached.

From an order allowing this motion and in conformity with its terms, the Spray Cotton Mills, the Leward Cotton Mills, the Randolph Cotton Mills and the Arista Mills Company excepted and appealed to the Supreme Court, assigning error in the entering of said order.

J. H. Burke for Bank of Alexander.

Clement & Clement and R. Lee Wright for Second National Bank of Jackson, Tenn.

Manly, Hendren & Womble and Ivie, Trotter & Johnston for Spray Cotton Mills.

H. M. Robins for Leward Cotton Mills.

J. A. Spence for Randolph Mills, Inc.

Craige & Craige for Arista Mills.

STACY, C. J., after stating the case: We have no hesitancy in affirming the judgment in so far as it requires the First National Bank of Jackson, Tenn., to come in and litigate its claim, if any it has, to the funds held under attachment in the present proceedings. *Temple v. Hay Co.,* 184 N. C., 239; *Freeman v. Howe,* 65 U. S., 450.

The general rule is, that one claiming a paramount right to property taken in attachment, which, if valid, would defeat the plaintiff's suit, must assert such right in the court first acquiring jurisdiction over the property. *Taylor v. Carryl,* 61 U. S., 583; *Peck v. Jenness,* 48 U. S., 612; *Metzner v. Graham,* 57 Mo., 404.

Likewise, in this jurisdiction at least, where several attachments have been levied on the same property, under processes issued by a number of Superior Courts, each having general and concurrent jurisdiction over the matter, which must inevitably result in a contest among the different creditors as to their respective rights of priority, we think it is within the power of the court, first acquiring jurisdiction of the property by seizure and attachment, to require the questions of priority, likely to arise among the attaching creditors, to be determined in that court. *Patrick v. Baker,* 180 N. C., 588; *Metzner v. Graham, supra; Bank v. Steinberg,* 44 Mo. App., 401. And in regard to such creditors, the law is, first in time of attachment, first in right, so far as the property attached is concerned (*Kittredge v. Bellows,* 7 N. H., 428; *Peck v. Jenness, supra*), except where two or more attachments are delivered to the sheriff at the same time, served simultaneously on the same property, and judgments rendered in favor of both or all of such creditors, the funds remaining after satisfaction of all prior attachments will be applied *pro rata,* when they are insufficient to pay the judgments of the simultaneously attaching creditors in full. *Freeman v. Grist,* 18 N. C., 217.

In an attachment of personal property, the sheriff, upon the service of the writ, takes possession of the property attached, and thus acquires a special interest therein, which he may enforce for the protection of the rights of all concerned. *Peck v. Jenness*, 48 U. S., 612. Subsequent attachments may be levied on the same property by the same sheriff, and where there are several attachments, the attaching creditors acquire a right to priority of satisfaction, so far as the property attached is concerned, not by right of priority of judgment, but by right of priority of attachment. C. S., 807; *Granite Co. v. Bank,* 172 N. C., 354; *Bank v. Watson,* 187 N. C., 107; *Norman v. Hallsey,* 132 N. C., 6; *Poole v. Symonds,* 1 N. H., 292; *Clarke v. Morse,* 10 N. H., 238.

Attachment partakes of the nature of an execution before judgment (*Johnson v. Whilden,* 166 N. C., 104); and as the lien begins with the levy of the attachment (*McMillan v. Parsons,* 52 N. C., 163), it is subject to all others of prior date and superior to those of subsequent date. *Morehead v. R. R.,* 96 N. C., 362. As remarked by *Mr. Justice Matthews* in *Freedman's S. & T. Co. v. Earle,* 110 U. S., 717, "It is the execution first begun to be executed, unless otherwise regulated by statute, which is entitled to priority." See, also, *Kittredge v. Emerson,* 15 N. H., 227, and *Kittredge v. Warran,* 14 N. H., 509, where the whole subject of attachment is fully considered by the New Hampshire Superior Court of Judicature.

This, however, need not deprive the parties of the right to proceed to judgment in the courts of their respective counties, and in such actions, those who claim the property by superior or paramount title should come in as interveners or be brought in as defendants, so that their claims may be properly adjudicated. C. S., 829; *Patrick v. Baker.* 180 N. C., 588; *Evans v. Aldridge,* 133 N. C., 378; *In re Snell,* 125 Fed., 154.

Speaking to a similar situation in *Peck v. Jenness, supra, Mr. Justice Grier* observed that, "where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. . . . For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other." See, also, *Metcalf v. Baker,* 187 U. S., 165, and *White v. Schloerb,* 178 U. S., 542.

And so, the garnishee, in each succeeding case, should set up as a defense, either absolute or *pro tanto,* that a prior attachment has been levied on the property in its hands belonging to the principal defendant (12 R. C. L., 835; 28 C. J., 286) and should also notify any adverse claimant to come in by intervention and make good its claim to the property attached. *Temple v. Hay Co.,* 184 N. C., 239; *Garity v. Gigie,* 130 Mass., 184; 12 R. C. L., 825. But the first court of general juris-

diction taking possession of the property may hold it and disburse the funds according to the respective rights of the parties as they may be made to appear in that court, on the question of priority. *Lemly v. Ellis,* 143 N. C., 200; *Bank v. Steinberg, supra.* If this course be not pursued in the instant case a serious wrong may be inflicted on the Bank of Alexander, the garnishee, as a portion of the attached funds is represented by bond given only in the present proceeding. *Martin v. McBryde,* 182 N. C., 175; *Patrick v. Baker,* 180 N. C., 588; 28 C. J., 303.

We have not overlooked the learned opinion of *Mr. Justice Miller* in *Buck v. Colbath,* 70 U. S., 334, wherein he classifies the different writs, or processes of the court, and points out with particularity the distinction between replevin and attachment; nor is the position here taken necessarily at variance with what is said in that opinion. Sometimes, in a case of first impression, the court finds it necessary to mold its decrees to meet the exigencies of the particular case. *McNinch v. Trust Co.,* 183 N. C., 33.

As herein modified and interpreted, the order appealed from will be upheld.

Modified and affirmed.

STATE v. DAVE WOOTEN.

(Filed 27 May, 1926.)

Homicide—Murder—Instructions—Self-Defense—Justifiable Homicide—Appeal and Error.

While under sufficient supporting evidence the prisoner on trial for murder is entitled to a charge of acquittal if he, in the opinion of the jury, killed the deceased without malice, while acting under the reasonable apprehension that such was necessary to protect him from great bodily harm, an unconnected portion of the charge will not be held for reversible error in failing to give him the full benefit of complete self-defense, if the charge in its related parts construed contextually sufficiently and unmistakably instructs the jury upon the correct application of the law.

APPEAL by defendant from *Stack, J.,* at Fall Term, 1925, of WATAUGA.

Criminal prosecution tried upon an indictment charging the defendant with the murder of one Leonard Triplett.

Verdict: Guilty of manslaughter.

Judgment: Defendant ordered to be confined in the State's prison for a period of not less than 3 nor more than 5 years.

Defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

F. A. Linney, J. H. Burke, John H. Bingham and Brown & Bingham for defendant.

STACY, C. J. The defendant, a deputy sheriff of Watauga County, in company with a fellow-officer, J. V. Baugess, and Wiley Williams, on the night of 7 September, 1925, went out to investigate and to prove or disprove the correctness of information which had come to them that whiskey or liquor was being unlawfully sold and handled by some one just outside the town of Blowing Rock. They first met the deceased, Leonard Triplett, with two others in a Ford car which they searched. This apparently angered the occupants of the car very much. Finding nothing in the car, it was released and the officers proceeded up the road a short distance when they met another car, which they also searched, together with the surrounding woods.

While thus engaged, the deceased and his companions came back in their car and began cursing and abusing the officers. Finding no contraband liquor in the second car, the officers were in the act of getting into their car when the deceased kicked the defendant. The defendant turned immediately, stepped off the running-board of his car, engaged in a tussle with the young men, according to his testimony, and shot the deceased in an effort to repel the assault that was being made upon him and to save himself from great bodily harm.

On the other hand, the evidence offered by the State tended to show that the deceased was 6 or 8 feet from the defendant when the fatal shot was fired; that no assault had been made upon him; and that the killing was unprovoked, save the argument and cursing that was going on between them.

The only serious exception appearing on the record is the one addressed to the following portion of the charge:

"Ordinarily, a simple assault—and the mere kicking of another is a simple assault—and not an assault with a deadly weapon—ordinarily a mere simple assault is not sufficient to reduce the crime of murder in the second degree down to manslaughter, but if the number of the deceased and his companions, and their manner and their conduct and their language induced the prisoner to believe that he was about to receive serious harm, then that would be sufficient to reduce the crime to manslaughter."

This instruction, it must be conceded, as it is by the Attorney-General, fails to give the defendant the full benefit of his plea of self-defense; and, if it stood alone, the error could only be corrected by awarding a new trial. But in the very next paragraph, his Honor continued as follows:

"If the prisoner has satisfied you, gentlemen of the jury, that the killing was without malice, and has further satisfied you that at the time he shot the fatal shot, that he actually apprehended or feared that he was about to be killed or to receive enormous bodily harm, and further has satisfied you that he had reasonable grounds for his apprehensions—you and not he to be the judges of the reasonableness of his apprehensions—and that he shot under such circumstances, then the killing would be excusable. In other words, gentlemen of the jury, if the conduct and language of the deceased, or his language and conduct in connection with the conduct and language and number of the associates of the deceased, excited in the mind of the prisoner the fear that he was about to be killed or receive great bodily harm, and that the prisoner had reasonable grounds for his fear, and the prisoner killed the deceased under such reasonable apprehension, then the killing would be excusable."

From this, it will readily be seen that the error complained of was fully cured, and its harmful effect, if any, completely removed.

The charge must be taken and examined as a whole, or at least the whole of what was said regarding any special phase of the case or the law, and, if thus considered, the charge in its entirety appears to be correct, slight deviations in detached portions will not be held for reversible error. *McDaniel v. R. R.,* 190 N. C., 474; *Milling Co. v. Highway Commission,* 190 N. C., p. 697, and cases cited.

The remaining exceptions, relating to the admission and exclusion of evidence and those to other portions of the charge, must all be resolved in favor of the validity of the trial. There is a sharp conflict in the evidence on the issue of guilt, which the jury alone could determine. This, it has done in a trial free from reversible error.

No error.

G. T. CARSWELL, RECEIVER, v. C. R. TALLEY ET AL.

(Filed 27 May, 1926.)

1. Corporations—Fraud—Stockholders—Deeds and Conveyances.

It is not a fatal misjoinder of both parties and causes for receiver of a corporation to sue husband and wife, the only stockholders, for mismanagement of corporate affairs, fraudulent misappropriation of funds against rights of creditors, and to set aside deed fraudulently made to them in entireties.

2. Appeal and Error—Docketing Appeals—Hearings—Rules of Court.

When the case on appeal has been agreed upon by the parties and so appears by entries of record, and at the request of either party the clerk

of the Superior Court has sent it up to the clerk of the Supreme Court and there docketed promptly, as it is the clerk's duty to do, and in time for argument of the call of the district under the rule of Court, though otherwise the case would not then have stood for argument, it being thus docketed takes it from the control of the parties litigant, and the hearing will accordingly be regularly heard as placed.

APPEAL by defendants from *Harding, J.*, at February Term, 1926, of MECKLENBURG.

Civil action by the receiver of the Charlotte Jiffy Company, an insolvent corporation, to recover of the defendants, directors and sole stockholders of said insolvent corporation, damages for the alleged negligent and reckless management of the company's business by the defendants, and to set aside a deed, alleged to have been made by virtue of an order entered in a friendly suit brought by Flora M. Kriminger against D. E. Kriminger for the purpose of having land owned by D. E. Kriminger in his individual right converted into an estate by the entirety by conveying the title to the two as husband and wife, with the intent to hinder, delay and defraud the creditors of the said D. E. Kriminger, etc.

A demurrer was interposed by the defendants on the ground of a misjoinder of both parties and causes of action. From a judgment overruling the demurrer, the defendants appeal.

Joe W. Ervin and Stewart, McRae & Bobbitt for plaintiff.
Wade H. Williams and Preston & Ross for defendants.

STACY, C. J., after stating the case: The demurrer was properly overruled, and the judgment must be affirmed on authority of *Chemical Co. v. Floyd,* 158 N. C., 455; *Robinson v. Williams,* 189 N. C., 256, and cases there cited.

The pertinent holding in *Chemical Co. v. Floyd* is stated in the 5th head note as follows: "A complaint is not objectionable for a misjoinder of parties which alleges a joint wrong as to two of the defendants in misapplying and misappropriating the moneys of the plaintiff, and seeks to set aside a deed made by one of them to his wife with the intent of delaying and defrauding his creditors, inclusive of the plaintiff's demand."

The instant case is controlled by the principle announced in the *Floyd case.*

A question of procedure was presented on a preliminary motion by counsel for appellee to have this appeal heard at the present term, which probably merits a word in regard to the rules.

The case was heard at the February Term, 1926, Mecklenburg Superior Court, on the demurrer interposed by the defendants to the plaintiff's complaint, which was overruled. Notice of appeal was given in open court, and, by consent, it was ordered that the summons, complaint and demurrer should constitute the case on appeal to the Supreme Court. The case on appeal was prepared by appellants and certified to this Court by the clerk of the Superior Court of Mecklenburg County, at the instance of counsel for appellee, on 31 March, 1926, more than fourteen days before the call of the docket from the Fourteenth District, the district to which the case belongs. Counsel for appellants were cognizant of the fact that the record of the case on appeal had been certified to this Court, and, on 3 April, counsel for appellee notified counsel for appellants that they would move to have the appeal dismissed if briefs were not filed in time for the case to be heard when the docket from the Fourteenth District was called on 20 April, 1926.

Counsel for appellee, instead of moving to dismiss the appeal, as they might have done *(Brafford v. Reed,* 124 N. C., 345), lodged a motion to have the case heard at a subsequent date during the present term of court. This was resisted by counsel for appellants on the ground that as the case was tried below since the beginning of this term, the appeal was not properly before the Court, but would regularly stand for argument at the Fall Term, 1926, and lodged a counter-motion for a continuance until that time. On denial of the motion for a continuance, the case was subsequently submitted under Rule 12 without argument.

Counsel for appellants were in error in thinking that the case was not properly before the Court for hearing at the Spring Term, 1926. *Clegg v. R. R.,* 132 N. C., 292; *Caldwell v. Wilson,* 121 N. C., 423. True, the appeal was not required to be brought to this term, but having been docketed here fourteen days before the call of the district to which it belongs, it was regularly on the calendar for hearing at the present term. Rule 5, Vol. 185, p. 788, as amended, Vol. 189, p. 843; *Trust Co. v. Parks,* 191 N. C., 263; *Avery v. Pritchard,* 106 N. C., 344.

Nor can it make any difference that the record or transcript on appeal was forwarded to this Court at the instance of counsel for appellee. As remarked by *Furches, J.,* in *Brafford v. Reed,* 124 N. C., 345, "when a case on appeal comes into the possession of the clerk, it is his duty to docket it at once, and it will be deemed to be docketed from that time." When the transcript of the case on appeal reaches the clerk, it then becomes a record of this Court, and is no longer subject to the control of the parties or their counsel. *S. v. Farmer,* 188 N. C., 243.

Affirmed.

SAVAGE BROTHERS TIMBER COMPANY v. M. E. COZAD ET AL.

(Filed 27 May, 1926.)

1. **Deeds and Conveyances—Description—Reference to Cases Pending and Maps—Evidence of Identification.**

   A reservation in a deed to lands refering to records in a case pending in the same county as to a part, and to certain maps as to the other part reserved can be made more certain by the introduction of the case and maps referred to, and this makes untenable the objection that the reservation was void for vagueness of description.

2. **Actions—Cross-Actions—Counterclaim—Burden of Proof—Deeds and Conveyances.**

   In a suit to remove a cloud on title to lands, the defendant setting up title by way of counterclaim or cross-action to part of the lands described in the plaintiff's complaint has the burden of proving his allegations in so far as they relate to the counterclaim.

APPEAL by defendant, M. E. Cozad, from *Bryson, J.*, at November-December Special Term, 1925, of CLAY.

Civil action to quiet titles and to remove clouds therefrom. The plaintiff brings this action alleging that it is the owner of three separate tracts of land, and that the defendants claim some interest or estate therein, which it seeks to remove as a cloud on its title.

The defendants deny plaintiff's ownership of the several tracts and aver that they are the owners of certain lands described in their answer and that plaintiff's claim constitutes a cloud on their title, which they ask, by way of cross-action or counterclaim, to have removed.

Upon the issues thus joined, the jury found that the plaintiff was the owner of two of the tracts of land described in the complaint, and the defendants the owners of some of the lands described in the answer.

From the judgment rendered on the verdict declaring the claim of the defendants to the two tracts of land found to belong to the plaintiff to be a cloud thereon and decreeing same to be void and that it should be removed therefrom, the defendant, M. E. Cozad, appeals, assigning errors.

M. W. Bell and Moody & Moody for plaintiff.
R. L. Phillips and Anderson & Gray for defendants.

STACY, C. J. While the record in this case is quite voluminous, the questions presented fall within a very narrow compass. In fact, it is practically conceded that the case pivots on two exceptions.

On 11 October, 1906, the Hiawassee Lumber Company conveyed certain lands, covered by what is known as the Olmstead Grants, to J. C. Angier by deed containing the following general exception:

"Excepting from the operation of this deed 1,488 acres lapped by certain grants for land in Clay County issued to one W. H. Herbert, which are now in litigation in two suits pending in the Superior Court of Clay County, N. C., wherein Henry M. McAden, *et al.*, are plaintiffs, and Lou Herbert *et al.*, and D. S. Herbert *et al.*, are defendants; and also excepting from the operation of this deed and reserving and keeping unto themselves title to 2,632 acres of said land, to wit, parts of the following tracts: 6556, 6687, 6686, 6685, 6684, 6683, 6687, 6681, 6679, 6671, 6673, 6557, 6550, 6672, 6674, 6675, as shown by the aforesaid map of C. C. Standridge as being lapped by tract 4500."

Thereafter, the Hiawassee Lumber Company conveyed the lands, covered by the above general exception, to Savage Brothers Lumber Company, and by mesne conveyance the said lands have been acquired by the plaintiff.

It is the position of the defendant that the description contained in the above exception is void for uncertainty (*Waugh v. Richardson*, 30 N. C., 470), and, therefore, nothing was excepted by it and nothing passed under the subsequent deeds purporting to convey the lands intended to be excepted from the Angier deed. *Harris v. Woodard*, 130 N. C., 580; *Watford v. Pierce*, 188 N. C., 430, and cases there cited.

Plaintiff offered in evidence the records in the cases of Henry M. McAden *et al.*, *v.* D. S. Herbert *et al.*, and Henry M. McAden *et al.*, *v.* Lou Herbert *et al.*, identifying the lands in litigation in said suits, pending in the Superior Court of Clay County, and also the map of C. C. Standridge showing all the grants mentioned in said exception, together with the lappages, etc. These, then, gave certainty and definiteness to the exception first mentioned in the Angier deed and thus rendered it operative, just as if the lands excepted had been described in the deed by particular metes and bounds. *Brown v. Rickard*, 107 N. C., 639; *Southgate v. Elfenbein*, 184 N. C., 129.

It is conceded by the defendant that unless the exception be held void for vagueness and uncertainty, the motion for judgment of nonsuit was properly overruled.

We think the reference in the exception to other instruments showing the lands intended to be excepted from the operation of the deed sufficient to let in evidence of identification under the maxim, *id certum est quod certum reddi potest. Lumber Co. v. Cedar Co.*, 142 N. C., 411, and cases there cited.

But the defendant stressfully contends that error was committed by the trial court in requiring him to handle the laboring oar, or to assume the burden of showing title to the lands described in the answer.

Nothing is better settled by the authorities on the subject than that, in ejectment, the plaintiff must recover, if at all, upon the strength

of his own title, and not upon the weakness of his adversary's. *Rumbough v. Sackett,* 141 N. C., 495; *Pope v. Pope,* 176 N. C., 283. To recover in such action, the plaintiff must show title good against the world, or good against the defendant by estoppel. *Mobley v. Griffin,* 104 N. C., 112; *Campbell v. Everhart,* 139 N. C., 502; *Moore v. Miller,* 179 N. C., 396. It can make no difference, in ejectment, whether the defendant has title or not, the only inquiry being whether plaintiff has it, and upon this issue the plaintiff has the burden of proof. *Pope v. Pope, supra.*

The rule as to the burden of proof was properly observed in the instant case. The defendants were required to assume the burden of proof only on their cross-action or counterclaim, in which they were, *pro hac vice,* plaintiffs. In this, there was no error. *Speas v. Bank,* 188 N. C., 524; *Hunt v. Eure,* 189 N. C., 482.

The learned counsel for the appealing defendant was impressive in his argument before us, but a careful perusal of the entire record leads us to the conclusion that the case has been tried substantially in accord with the decisions on the subject and the principles of law applicable. The verdict and judgment will be upheld.

No error.

MURCHISON NATIONAL BANK v. JOHN A. McCORMICK ET AL.

(Filed 27 May, 1926.)

1. Pleadings—Cause of Action—Demurrer.

When it is alleged in the complaint that the action is upon promissory notes brought six months after maturity with allegations that six months was to be given the payee to liquidate and apply the collateral, which had been done and a balance was still due, the amount involved, a demurrer *ore tenus* to the sufficiency of the complaint to state a cause of action is bad, and may not be aided by counter allegations as to a parol agreement set out by way of answer.

2. Reference—Statutes.

When the matter in dispute involves a long itemized accounting by the payee of a note for a period of six months in excess of five hundred dollars, formerly cognizable by courts of equity: *Held,* a compulsory order of reference, over objection of a party was proper under the provisions of C. S., 573 (1), (5).

3. Same—Pleas in Bar—Pleadings—Cause of Action.

A party to an action may not successfully object to a compulsory reference when the same is allowed by our statute, C. S., 573, (1), (5), and the complaint states a good cause of action, and no complete plea in bar to the entire cause is set up by him.

4. Reference—Exceptions—Trial by Jury—Evidence.

Where a party to an action has duly excepted to a compulsory reference and has not thereafter waived or lost his right to a trial by jury, he may have the issues raised by him passed upon by the jury upon the record and evidence taken before the referee.

APPEAL by defendants from order for compulsory reference, made by *Midyette, J.*, at March Term, 1926, of NEW HANOVER. Affirmed.

Upon motion of plaintiff, the court being of opinion, after consideration of the pleadings in this action, that the trial of the issues of fact raised thereby, requires the taking of a long and complicated account, and that the matters alleged in the answers are such as the courts of equity of this State had jurisdiction of, prior to 1868, and involve amounts in dispute, not less than $500, in value, ordered a compulsory reference. C. S., 573, (1) and (5). Defendants excepted to the order, and appealed therefrom to the Supreme Court.

Pending the appeal, which was docketed in this Court, on 24 April, 1926, after the week set apart, under the rules of this Court, for the hearing of appeals from the Eighth Judicial District, which includes New Hanover County had passed, upon affidavits filed, defendants moved, in this Court, for a writ of prohibition, prohibiting further proceeding in the action before the referee, until the final disposition of the appeal. This motion was considered by the court and continued until the close of arguments in appeals at this term from the Twentieth District. It was also ordered that the appeal should be set down for argument upon its merits at the close of the call of appeals at this term from the Twentieth District. Pursuant to this order, the appeal was heard and decided on 19 May, 1926.

Rountree & Carr and Varser, Lawrence, Proctor & McIntyre for plaintiff.

McNeill & Hackett, Junius J. Goodwin, J. G. McCormick and Dye & Clark for defendants.

CONNOR, J. Defendant's demurrer, *ore tenus,* first made in this Court, for that the complaint fails to state facts sufficient to constitute a cause of action, cannot be sustained. It affirmatively appears upon the face of the complaint that this action was not begun against defendants, upon their contract of guaranty, until six months had elapsed after the maturity of the indebtedness for which plaintiff alleges in its complaint defendants are liable. In the contract alleged in the complaint, a copy of which is attached thereto as Exhibit A, the only condition imposed upon plaintiff is that it "shall upon default in the payment of the above obligation grant to the Merchants & Farmers Bank and to the signers of this instrument a period of six months in which

to collect and liquidate the collateral notes and other securities herein pledged before this obligation shall be due and payable." It is specifically alleged in the complaint that "at the time of the institution of this action, all of the said notes were more than six months past due." The parol agreement which defendants set up in the answer is not alleged in the complaint, and therefore cannot be considered in ruling upon defendants' demurrer.

A careful reading of the answers in this action discloses no plea in bar of plaintiff's "entire cause of action," as alleged in the complaint. We therefore hold upon authority of *Bank v. Evans,* 191 N. C., 535; *Lumber Co. v. Pemberton,* 188 N. C., 532; and *Alley v. Rogers,* 170 N. C., 538, that the order of compulsory reference was not erroneous.

The order is affirmed. It is clear, from a reading of the pleadings in this action, that it is a proper action for trial by a referee. Defendants having excepted to the order, cannot be deprived of their constitutional right to have the issues of fact tried by a jury provided they preserve this right as provided by law. C. S., 573. They have no just ground for complaint, certainly, in law, that if issues are hereafter submitted to a jury, they will be determined in accordance with the statute enacted by the General Assembly of this State. (C. S., 573(5), which provides that upon the trial of the issues, after a compulsory reference, only the "written evidence taken before the referee" shall be submitted to the jury.

We do not deem it necessary or advisable to discuss in this opinion the merits of this appeal further or to set out in detail the matters set up in the answers, which defendants contend constitute pleas in bar. It is apparent from the amount involved and the defenses relied upon, that many questions will arise during the course of the litigation. These questions ought not to be considered or discussed by this Court until they are properly presented to us upon appeal.

Having disposed of this appeal upon its merits, the motion for the writ of prohibition need not further be considered. It is dismissed for the reason that defendants can no longer be interested in pressing their motion. The order of compulsory reference is

Affirmed.

MURCHISON NATIONAL BANK v. JOHN A. McCORMICK ET AL.

(Filed 27 May, 1926.)

(For digest see *S. c., ante,* 42.)

APPEAL by defendants from order for compulsory reference, made by *Midyette, J.,* at March Term, 1926, of NEW HANOVER. Affirmed.

Defendants excepted to the order for compulsory reference, made upon motion of plaintiff, and appealed therefrom to the Supreme Court. Motion for writ of prohibition made in this Court was continued until the call of appeals from the Twentieth District at this term.

Rountree & Carr and Varser, Lawrence, Proctor & McIntyre for plaintiff.

McNeill & Hackett, Junius J. Goodwin, J. G. McCormick and Dye & Clark for defendants.

CONNOR, J. This appeal involves the same questions, between the same parties, as those presented in the appeal in No. 291. The notes alleged to have been executed by the Merchants and Farmers Bank of Maxton, set out in the complaint in this action are not the same as those set out in the complaint in the action in which the order for compulsory reference was affirmed in No. 291. Herein is the only difference in the two actions. The orders to which defendants excepted are identical. The appeals are companions and were argued in this Court together. It was conceded that the disposition of one appeal would determine the disposition of the other.

The motion for the writ of prohibition in this action is dismissed. The order for compulsory reference is

Affirmed.

H. F. HARDY v. H. ABDALLAH.

(Filed 27 May, 1926.)

1. Deeds and Conveyances—Married Women—Purchase-Money Mortgage—Feme Covert—Constitution—Priority—Statutes.

A purchase-money deed given by a *feme* covert, living with her husband, in which the husband does not join and which does not contain any privy examination of the wife is void because not complying with Art. X, sec. 6 of the Constitution, and C. S., 997; and a subsequent mortgage duly executed by them both, docketed after the writing purporting to be a purchase-money deed takes priority over such deed.

2. Purchase-Money Mortgage—Ratification.

Words in a subsequent mortgage referring to a prior purchase-money deed of trust by declaring the land "free and clear of all encumbrances, except one note for purchase money due in 1922," is a mere reference, and does not amount to a ratification of the prior purchase-money deed so as to cure the purchase-money deed of invalidating defects of probate.

APPEAL by plaintiff from *Barnhill, J.*, at November Term, 1925, of LENOIR.

Controversy without action, submitted on an agreed statement of facts.

Plaintiff appeals from a judgment in favor of the defendant.

F. E. Wallace for plaintiff.
Sutton & Greene for defendant.

STACY, C. J. The parties to the present proceeding, having a question in difference which might properly become the subject of a civil action, have submitted the same for determination without action, upon an agreed statement of facts as authorized by C. S., 626.

The question to be determined is whether a purchase-money deed of trust, covering real estate presently acquired by grant, signed by a married woman who is living with her husband, and in which the husband does not join, and the privy examination of the *feme covert* is not taken, is superior to the lien of a subsequent deed of trust on the same property, duly executed by the married woman and her husband, and in which it is recited in the warranty clause that the said land "is free and clear of all encumbrances, except one note for purchase money due 1922."

His Honor was of the opinion, and so held, that the purchase-money deed of trust is void and that the lien created by the duly executed deed of trust, though registered after the first paper-writing, is superior thereto. In this, we think his judgment is supported by the decisions in *Stallings v. Walker,* 176 N. C., 321, and *Piano Co. v. Spruill,* 150 N. C., 168.

The facts are that on 21 November, 1919, Mrs. Ludie S. Huggins, a married woman living with her husband, purchased a tract of land from one J. T. Taylor, and, upon receipt of deed, immediately delivered back to her grantor a paper-writing purporting to be a deed of trust, made to the Rouse Banking Company, trustee, and given to secure the payment of two notes, due two and three years thereafter respectively, and representing the balance of the purchase price of said land. This paper-writing, purporting to be a deed of trust, was signed and acknowledged by Mrs. Huggins, but without any privy examination on her part and without the written assent of her husband. The instrument was filed for registration in the office of the register of deeds for Lenoir County on 29 November, 1919.

Thereafter, on 21 May, 1921, Mrs. Huggins and her husband, being indebted to J. A. Jones in the sum of $367.30, as evidenced by their promissory note, duly executed and delivered to H. E. Shaw, trustee, a

deed of trust on the same property to secure the payment of said note at maturity. In the warranty clause of this instrument it is stated that the land "is free and clear of all encumbrances, except one note for purchase money due 1922."

The plaintiff, H. F. Hardy, is the holder, by assignment, of the notes given by Mrs. Ludie S. Huggins to J. T. Taylor; while the defendant is the holder, by assignment, of the note given by Mrs. Ludie S. Huggins and her husband to J. A. Jones.

The property has been sold under the second deed of trust, or the one given to secure the payment of the Jones note of $367.30, and the funds arising therefrom are insufficient to pay the notes held by plaintiff and the one held by the defendant. Who is entitled to priority of payment out of the funds, the plaintiff or the defendant? This is the question to be decided.

The first paper-writing, signed and acknowledged by Mrs. Huggins, purporting to be a deed of trust charging her real estate for the security of a debt, is void, it appearing that she was living with her husband at the time who did not join her in the deed as required by Art. X, sec. 6, of the Constitution and C. S., 997, nor was her privy examination taken as required by the statute just mentioned. *Foster v. Williams*, 182 N. C., 632; *Smith v. Ingram*, 130 N. C., 100; *Scott v. Battle*, 85 N. C., 184.

True, it has been held that where a mortgage or deed of trust is invalid, by reason of some defect in its execution, still the same may be recognized by a subsequent mortgage or deed of trust, duly executed in manner and form as required by law, when it appears that the latter agreement was made subject to the former, and sufficient reference is made therein to amount to a ratification and adoption of the prior agreement. *Bank v. Smith*, 186 N. C., 635; *Brasfield v. Powell*, 117 N. C., 140; *Ward v. Anderson*, 111 N. C., 115; *Hinton v. Leigh*, 102 N. C., 28. This upon the principle that the binding force and effect of the defective or void instrument is derived from the subsequent agreement, made subject thereto and in recognition and adoption of it as a valid contract, thus meeting the requirements of the statute of frauds, and that the parties claiming under the second instrument are estopped to deny the validity of the first as their title vested subject to it. *Fort v. Allen*, 110 N. C., 183; *Gibson v. Lyon*, 115 U. S., 439; *Price v. Hart*, 29 Mo., 171; *Crooks v. Douglass*, 56 Pa. St., 51. See, also, *Sills v. Bethea*, 178 N. C., 315.

It has also been held that a mere reference to a prior encumbrance, not amounting to a ratification or adoption of it, and where the second is not made subject to the first, except as it may comply with the

requirements of the registration laws, the defective or void instrument is not thereby given any binding force and effect. *Blacknall v. Hancock*, 182 N. C., 369; *Piano Co. v. Spruill*, 150 N. C., 168.

The present case comes squarely within the meaning and purpose of these early named decisions, and the judgment must be upheld on authority of *Piano Co. v. Spruill, supra.*

Affirmed.

JOHN E. PATTON v. CHAMPION FIBRE COMPANY AND W. J. DAMTOFT.

(Filed 27 May, 1926.)

1. **Actions—Joinder—Election—Principal and Agent—Parties.**

In an action for fraudulent misrepresentations the principal and agent making the misrepresentations are jointly and severally liable, and the plaintiff has his election to sue either jointly or severally, and plaintiff's motive for joinder, if he has clearly this right, is irrelevant.

2. **Removal of Causes—Federal Courts—Sufficiency of Allegations—Petition.**

In a petition for removal, allegations that the joinder of a resident and nonresident defendant was made for the purpose of preventing a removal, and mere statements that the joinder was fraudulently made for this purpose are not sufficient. Facts must be particularly alleged forcing the conclusion that the action is separable and the joinder was fraudulent and without right.

3. **Same—Matters of Defense.**

A general denial of the liability of the resident defendant, and the pleading of the statute of limitations, are matters of defense and cannot successfully be used to support a petition for removal.

4. **Same—Prior Actions.**

In a petition for removal of a cause to the Federal Court, for diversity of citizenship, an allegation that a prior action on the same cause of action was brought against the nonresident defendant, removed to the Federal Court, and that plaintiff took a nonsuit therein, does not alone have the effect of proving in a subsequent action wherein a resident defendant is joined, that the joinder was fraudulent.

APPEAL by the Champion Fibre Company from *Dunn, J.*, denying a motion to remove the cause to the United States District Court.

The plaintiff alleged that the Champion Fibre Company is a corporation and that Damtoft was its agent; that on 24 December, 1921, the corporation sold and conveyed to the plaintiff certain tracts of land and timber situated in Cherokee County; that for the purpose of inducing the plaintiff to buy said land and timber the defendants falsely and fraudulently misrepresented the quantity of merchantable timber and

chestnut wood; and that the plaintiff relied upon the representation, was deceived, and caused to suffer loss to the amount of $30,000. In apt time the defendant corporation filed its motion for removal before the clerk and from his judgment an appeal was taken to the judge, who denied the motion. The defendant corporation excepted and appealed.

Marcus Erwin and Mark W. Brown for plaintiff.
Thomas S. Rollins for Champion Fibre Company.

ADAMS, J. The complaint states a cause of action for joint liability and the plaintiff had a legal right to sue one or both the defendants. *Crisp v. Lumber Co.*, 189 N. C., 733; *Williams v. Lumber Co.*, 176 N. C., 174; *Stewart v. Realty Co.*, 159 N. C., 230. In the petition for removal it is not said that the controversy is separable. But it is alleged that the defendants were fraudulently joined for the purpose of retaining the jurisdiction of the State court; and, further, that the complaint herein is identical with the complaint in a former action instituted by the plaintiff against the defendant corporation and removed to the United States District Court, in which the plaintiff took a nonsuit; that Damtoft did not make the alleged representations and that the plaintiff did not rely on them; that after looking over the land and timber the plaintiff offered to make the purchase at a fixed price; that Damtoft's representations, if any, are barred by the statute of limitations; and that Damtoft is not a necessary or proper party.

An action commenced in a State court against a resident and a nonresident defendant may be removed to the Federal Court by the nonresident defendant if it can be shown that the action is separable and that the resident defendant is fraudulently joined for the purpose of preventing the removal; but such removal cannot be had if it does not appear that the resident defendant is fraudulently joined for such purpose. The petition for removal must contain, not only an allegation of the fraudulent joinder, but such a full and direct statement of the facts and circumstances as will demonstrate that a fraudulent joinder has been effected for the purpose of defeating the removal. *Rea v. Mirror Co.*, 158 N. C., 24. The petition may show that the joinder is a fraudulent device; "but the showing must consist of a statement of facts rightly leading to that conclusion, apart from the pleader's deductions." *Wilson v. Iron Co.*, 257 U. S., 92, 66 Law Ed., 144; *Johnson v. Lumber Co.*, 189 N. C., 81.

Neither the fact that the former suit against the defendant corporation was discontinued in the Federal Court and the present suit instituted in the State court against both the defendants, nor the mere allegation of a purpose to prevent the removal, nor the mere denial of the

allegations in the complaint is sufficient. *Rea v. Mirror Co., supra:* 3 Foster's Federal Practice, 3008, sec. 548 a; *R. R. v. Miller*, 217 U. S., 209, 54 Law Ed., 732. In *R. R. v. Cockrell*, 232 U. S., 146, 58 Law Ed., 544, it is said that it is not enough to assert that there was a fraudulent joinder of defendants, but there must be "a statement of facts rightly engendering that conclusion"; and that "merely to traverse the allegations upon which the liability of the resident defendant is rested or to apply the epithet 'fraudulent' to the joinder will not suffice; the showing must be such as compels the conclusion that the joinder is without right and made in bad faith." And in *R. R. v. Sheegog*, 215 U. S., 308, 54 Law Ed., 208: "On the other hand, the mere epithet 'fraudulent' in a petition does not end the matter. In the case of a tort which gives rise to a joint and several liability, the plaintiff has an absolute right to elect, and to sue the *tort-feasors* jointly if he sees fit, no matter what his motive, and therefore an allegation that the joinder of one of the defendants was fraudulent, without other ground for the charge than that its only purpose was to prevent removal, would be bad on its face."

The complaint, as we have said, states against the defendants a cause of joint liability in tort and the plaintiff had the legal right to proceed against one or both the defendants. An analysis of the petition for removal will show that with the exception of the allegation referring to the nonsuit in the Federal Court the averments are chiefly matters of defense. True, it is alleged that the plaintiff's cause is barred, but the statute of limitations is available only as a defense and never to support a cause of action. 1 Foster's Fed. Practice, 1051, sec. 181; *Smith v. Quarries Co.*, 164 N. C., 338; *Pruitt v. Power Co.*, 165 N. C., 416; *Patterson v. Lumber Co.*, 175 N. C., 90.

We think the judgment should be

Affirmed.

T. P. ROGERS AND E. M. CLAYTON AND BELVA CLAYTON, HIS WIFE v. JOHN ROGERS.

(Filed 27 May, 1926.)

1. **Actions—Misjoinder—Demurrer—Dismissal—Pleadings—Consent.**

A proceeding under the provisions of C. S., ch. 9, to establish the true dividing line between adjoining owners of land, will be dismissed upon demurrer for misjoinder of parties and causes of action that involve the title or interests of others not related to the matter in dispute, and which are entirely independent thereof. In this case it appearing that no demurrer had been interposed and that the answer had been filed, it is suggested that by consent of the parties they may proceed with their original controversy if so advised.

2. Appeal and Error—Supreme Court—Pleadings.

An answer filed in the Superior after the case is constituted in the Supreme Court on appeal can have no effect on the jurisdiction of the Supreme Court.

APPEAL by defendant from *Siler, Emergency Judge,* at February Term, 1926, of CHEROKEE.

Dillard & Hill for plaintiff.
M. W. Bell for defendant.

ADAMS, J. The plaintiffs instituted a proceeding before the clerk to establish a disputed boundary line as provided in C. S., 9. They filed their petition, the defendant filed an answer, and the cause was put on the civil docket for trial in term. Thereafter the plaintiffs filed an amendment to their complaint and the defendant demurred. The demurrer was overruled and the defendant excepted. In the amended complaint it is alleged: 1. That a part of the controversy relates to the dividing line between the lot numbered 19 and the two lots numbered 24 and 26; that T. P. Rogers has a life estate in No. 24 and that the defendant has no interest therein but claims that the line is 13 or 14 poles south of its true location, and that he has taken possession of a part thereof and wrongfully withholds possession. 2. That there is a tract of about four acres situated south of the true line, which upon the death of Ancil Rogers descended to his three sons Richard, John, and T. P. Rogers, and that the defendant has taken possession of it and excluded his cotenants. 3. That the defendant is in possession of a half-acre lot and a dwelling thereon and wrongfully withholds possession from B. B. Clayton who is the owner thereof. 4. That the defendant has unlawfully taken possession of a part of No. 24 and wrongfully withholds possession from T. P. Rogers, one of the plaintiffs.

The relief sought is the location of the dividing line as contended by the plaintiffs; that T. P. Rogers be declared to be the owner of lot No. 24 and B. B. Clayton of No. 26, excepting the four-acre lot, and of the small lot of which the defendant is now in possession; that the plaintiffs be put into possession of their respective lots; that Richard L. Rogers, T. P. Rogers and the defendant be decreed tenants in common of the four-acre tract; that T. P. Rogers recover of the defendant $175 as damages for the wrongful withholding of his land; that B. B. Clayton recover $75; and that the defendant pay the costs of the action.

It is alleged in effect that neither B. B. Clayton nor Richard L. Rogers has any interest in No. 24; that Richard, John, and T. P. Rogers are joint owners of the four-acre lot; that B. B. Clayton is the

owner of a large part of No. 26, including the half-acre lot; and that T. P. Rogers has no interest therein. B. B. Clayton has no interest in the damages which T. P. Rogers seeks to recover, and T. P. Rogers has no interest in the damages sought by B. B. Clayton. In substance two distinct causes of action are joined to recover separate tracts of land from the defendant—the ownership of the tracts being not joint, but several. It would seem, therefore, that the plaintiffs as to the recovery of the different lots have no community of interest and that there is a misjoinder of parties and of causes of action. *Edgerton v. Powell*, 72 N. C., 64; *Logan v. Wallis*, 76 N. C., 416; *Thigpen v. Cotton Mills*, 151 N. C., 97; *Campbell v. Power Co.*, 166 N. C., 488. In such case the usual practice is to sustain the demurrer and dismiss the action. *Roberts v. Mfg. Co.*, 181 N. C., 204; *Shore v. Holt*, 185 N. C., 312; *Weaver v. Kirby*, 186 N. C., 387; *Bickley v. Green*, 187 N. C., 772. In this case, however, the defendant filed an answer, not a demurrer, to the original petition and demurred to the "amendment to the complaint." We think the demurrer should be sustained; but if the plaintiffs are willing to proceed on the original petition and answer and to withdraw or waive the matters set up in the "amendment," which embraces matters outside the original complaint, we see no valid reason why they should not be permitted to do so. The answer put in issue the location of the line,—the purpose for which the proceeding was brought; and if the plaintiffs succeed in establishing the line as they contend a subsequent inquiry as to damages in separate actions would not be precluded. If they do not see fit to proceed on the original pleadings the action should be dismissed without prejudice to the parties.

After the appeal was taken and while the case was pending here the defendant as a matter of precaution filed an answer to the amendment; but of course this could have no effect on the jurisdiction of this Court.

The judgment overruling the demurrer is

Reversed.

STATE EX. REL., H. L. MILLS, ADMINISTRATOR, v. NATIONAL SURETY COMPANY ET AL.

(Filed 27 May, 1926.)

1. Appeal and Error—Transcript—Docket—Record Proper—Certiorari—Motions.

Where the record of a case on appeal is not docketed in the Supreme Court at the time required by the rule of Court, preceding the call of the district in which it belonged for argument, it will be dismissed, but the Court may, in its discretion and not as a matter of right of the

appellant, grant further time for the filing of the record, if the appellant files the record proper in apt time and thereupon moves for a *certiorari*, showing that the delay was not attributable to himself.

2. Same—Agreement of Counsel.

The appellant is not justified in not docketing his case on appeal in time, by an agreement with the appellee to extend time for the settlement of a case on appeal.

3. Appeal and Error—Rules of Court—Dismissal.

The rule of Court requiring the docketing of the appeal within a certain time, etc., is mandatory.

APPEAL by plaintiff from *Barnhill, J.*, at November Term, 1925, of ONSLOW.

Civil action to recover damages for an alleged negligent and wanton killing of plaintiff's intestate by the defendant, J. R. Gurganus, sheriff of Onslow County.

From a verdict exculpating the defendant from any and all liability, and judgment rendered thereon, the plaintiff appeals, assigning errors.

Shaw, Jones & Jones for plaintiff.
John D. Warlick and E. W. Summersill for defendants.

STACY, C. J. This case was tried at the November Term, 1925, Onslow Superior Court, and resulted in a verdict and judgment in favor of the defendants. The plaintiff gave notice of appeal to the Supreme Court. By consent, plaintiff was allowed forty-five days within which to prepare and serve statement of case on appeal, and the defendants were allowed thirty days thereafter to file exceptions or counter statement of case. Later, this time was extended by mutual consent, and on 12 April, 1926, the case was settled by agreement of counsel and filed in this Court on 24 April, 1926. There was no application for a writ of *certiorari* in the meantime. *S. v. Farmer,* 188 N. C., 243. The appeal must be dismissed for failure to comply with the rules. *Stone v. Ledbetter,* 191 N. C., 777. It should have been docketed here not later than 16 February, 1926, fourteen days before the call of the Sixth District, the district to which it belongs. *Trust Co. v. Parks,* 191 N. C., 263.

We again call the attention of the profession to the fact that the rules governing appeals are mandatory and not directory. The Court has not only found it necessary to adopt them, but equally necessary to enforce them and to enforce them uniformly. The single modification sanctioned by the decisions is that, where from lack of sufficient time or other cogent reason, the case is not ready for hearing in regular order, it is permissible for the appellant to docket the record proper, within the time prescribed, and move for a *certiorari*, which motion may be allowed by the court,

in its discretion, on good cause shown, but such writ is not one to which the moving party is entitled as a matter of right. *Finch v. Comrs.*, 190 N. C., 154.

While the present appeal must be dismissed, under the circumstances disclosed by the record, we have examined appellant's exceptions and assignments of error and find them to be without substantial merit. The case seems to have been tried in accordance with the principles of law applicable. The controversy on trial reduced itself largely to a question of fact, which the jury has determined in favor of the defendants.

Appeal dismissed.

TOWN OF NEWTON ET ALS. V. STATE HIGHWAY COMMISSION OF NORTH CAROLINA.

(Filed 9 June, 1926.)

1. **Highways—Roads and Highways—Statutes—State Highway Commission—Discretionary Powers—County Seats.**

   Where a map showing the existing highways of a state is used by the Legislature showing the existing roads connecting the county seats, and is made a part of the general statute establishing a state-wide plan thereof, and a state highway commission is also therein created with general authority to relocate, change or discontinue the highways as they appear upon the maps, with proviso that this discretionary power should not extend to county seats as appeared on the map, the discretionary power, by the intendment and express words of the statute, does not extend to discontinuing or relocating the roads connecting the county seats, as outlined upon the map, and thus change the road from its former location running to and from the courthouse square.

2. **Same—Equity—Injunction.**

   While the courts may not determine the location of highways in a state-wide plan thereof, enacted by statute giving control and authority to a state highway commission created for the purpose, equity will enjoin the relocation of a highway in a county when such power in the commission has been reserved from the discretionary power given it.

3. **Highways—Roads and Highways—Statutes—Courts—State Highway Commission.**

   The question of whether the relocation of a state highway at a county seat connecting the various county seats of the State, will cost more than to continue its location as the statute requires, is one for the Legislature, and neither for the courts nor for the State Highway Commission to determine.

STACY, C. J., dissenting; ADAMS, J., concurring in dissenting opinion.

CIVIL ACTION, heard before *Webb, J.*, at Chambers, in Shelby, N. C., 10 May, 1926.

The following judgment was rendered:

This cause coming on to be heard before me at Chambers at Shelby, N. C., on 10 May, 1926, upon a temporary restraining order issued 27 April, 1926, by his Honor, Thos. J. Shaw, a judge of the Superior Court of North Carolina, by the terms of which the defendant was enjoined and restrained from awarding any contract or contracts for the grading of a road between Statesville and Newton along the proposed new route indicated specifically by the yellow lines on plaintiffs' map, Exhibit A, and from building bridges upon said route, and being heard, and all parties in interest being represented by counsel, and after full and careful consideration of the pleadings and affidavits offered, as well as the argument of counsel, the court finds as follows:

1. That two routes were surveyed for the location of the road from Statesville, the county seat of Iredell County, to Newton, the county seat of Catawba County, and these two routes are indicated on the map, plaintiffs' Exhibit A, the southern route being indicated by the red line and the northern route by the yellow line.

2. The southern route follows in a general way the present road between Statesville and Newton, and is shown on the map, which is part of chapter 2, Public Laws of 1921, indicating the designation and adoption of highways in North Carolina constituting a part of the State Highway system, and the same has hitherto been accepted by the State Highway Commission and taken over and is now maintained as a part of route 10 of the State Highway system. The distance from Statesville to the courthouse in Newton over the southern route, according to the survey made by the defendant, would be 22.81 miles, and the road would cross the Catawba River on the double track steel bridge constructed across this river under State supervision a few years ago. This road would enter the town of Newton in the southeastern portion and pass by the courthouse and along the principal street through the center of the town, and thence to Hickory over the present hard-surface road from Newton to Hickory.

3. The northern route, as indicated by the yellow line on the map, which the defendant has adopted and purposes to build from Statesville to Newton, does not go over any part of the present road between Statesville and Newton after leaving the corporate limits of Statesville and crosses the Catawba River several miles north of the present steel bridge and enters the town of Newton just inside of the corporate limits of said town on the northern side and at a distance of about $1\frac{1}{8}$ miles from the courthouse and connects with the Newton-Hickory hard-surface road at that point, and route 10 proceeds from this point in a northerly direction over the present hard-surface road to Hickory. The distance from Statesville over the yellow route where it connects with

the Newton-Hickory road, and following this road to the courthouse in Newton, is 21.42 miles, making a difference in distance on the northern route over the southern route of 1.39 miles between Statesville and Newton.

4. The cost of grading and constructing the road on the northern route would be less than on the southern, but if the southern route was adopted it would not be necessary to build a new bridge across the Catawba River; whereas, on the northern route it would require a considerable expenditure to build the bridge across the Catawba River. If the northern route should be built there is no barrier to prevent an entrance to the town of Newton so that route 10 could pass by the courthouse, or through the center of the business or residential section of Newton, and still connect with the present hard-surface road from Newton to Hickory.

5. The road from Statesville to Newton is a part of route 10, one of the great thoroughfares of the State, and if it is so constructed as not to pass through the town of Newton, but merely to skirt the northern boundary of said town, it would deny to the town of Newton the benefits and advantages arising from the heavy through traffic passing over this State thoroughfare and from the legitimate advertising that the town would get as a result thereof, and would deprive this flourishing and growing county seat of the benefits which accrue to a town being situated and located on the main line of travel, and this would result in irreparable injury and damage to the town of Newton.

Upon a careful review of chapter 2 of the Public Laws of 1921, establishing the State Highway Commission and providing for a system of State highways, it is manifest that the General Assembly had a dual purpose in mind, to wit, (1) that of creating a State system of highways, and (2) that of constructing the highways so that it would form a county-seat to county-seat system.

In order to enable the Highway Commisssion to properly function it was necessary to confer upon the commission broad discretionary powers, and with this purpose in mind the Legislature lodged the ultimate power and authority in the commission to locate the roads which constitute the State system, and gave it the power to change, alter, add to or discontinue any of the roads forming a part of the road system, as shown on the map which was made a part of the act of 1921. But there was one qualification and limitation of this power. It appears in the proviso at the end of section 7 as follows:

"*Provided*, no roads shall be changed, altered or discontinued so as to disconnect county seats, principal towns, State or national parks or reserves, principal State institutions and highway systems of other states."

Manifestly the commission is clothed with the power and authority to make such changes in the location of State highways as it may deem wise, in its sound discretion, subject to the limitation placed upon it by the foregoing proviso, and the court has no power to designate locations or determine routes. However, the terms of the proviso are positive and mandatory, and not uncertain or discretionary. In the exercise of a legal discretion they may determine whether a road shall be changed, altered or discontinued if they observe the mandate of the proviso. Therefore, the question in the case is: Has the commission complied with the intent and meaning of this proviso by changing the route of the road from Statesville to Newton so that, instead of running from county seat to county seat, it runs from the center of Statesville to a point just inside the corporate limits of the town of Newton and one and one-eighth of a mile from the courthouse or center of town, leaving the whole town of Newton to the south, and continuing as a part of route 10 in a northerly direction to Hickory?

The answer to this question can only be obtained by an interpretation of the meaning of this proviso, and, in order to properly interpret the proviso, an effort should be made to arrive at the true legislative intent. Where this intent is not clearly expressed it is always presumed that a statute was intended to have the more reasonable and beneficial operation permissible from the language used, and the effects and consequences of the one construction or the other may be resorted to as important aids in determining the intent and meaning. The Legislature clearly provided that county seats should not be disconnected. The building of a system of roads from county seats to county seats must have some definite situs or location. The distance from one town to another is measured by the distance from the center of each town and not from the outside corporate limits.

Another rule of interpretation is that the intention of the lawmaking power is to be ascertained by a reasonable construction of the act and not one founded on mere arbitrary conjecture. Applying the well known principle of construction to this proviso it seems that the Legislature was jealous of the rights of county seats and principal towns, and made a special exception in an effort to secure to them their rights with reference to the location of highways. I must believe that the Legislature intended by this proviso to do more than require that the roads should come inside the corporate limits, and leave the whole town untouched by a great through line of traffic. Coming just inside of the corporate limits of a town is not coming to town, and it is not so understood in the ordinary affairs of life. It is a matter of common knowledge that the State highways generally run through the county seats and principal towns and not merely skirt the outside limits, and I cannot

hold that the proposed location of this road as it enters the town of Newton is a compliance with the terms of the proviso of the statute, or that it is in harmony with the legislative intent.

The court cannot direct the location of the road and has no disposition to hinder or delay the construction of this important link in route 10, and therefore modifies the restraining order heretofore issued to the extent that the portion of the road situated in Iredell County is hereby released from this injunction and restraining order, but continues the restraining order and injunction in full force and effect as to that portion of said road located in Catawba County, and the defendant, its agents and servants, are hereby permanently restrained and enjoined from awarding any contract or contracts for the grading of said road or building of said bridges along the proposed route from the Catawba River to the town of Newton, as indicated substantially by the yellow lines on plaintiffs' map, Exhibit A.

From the foregoing judgment the defendant appealed.

Clyde R. Hoey, W. A. Self, Wilson Warlick, and W. C. Feimster for plaintiffs.

Attorney-General Brummitt, Assistant Attorney-General Ross, and A. A. Whitener for defendant.

BROGDEN, J. Chapter 2, Public Laws 1921, commonly known as the Road Act, when stripped of all bare technicalities and thin-spun discriminations, creates certain unmistakable objectives. These objectives may be classified as follows:

First. A certain type of public service for the people of the State, to wit, "the development of agricultural, commercial and natural resources of the State." Second. For the purpose of making this service effective there was created a definite instrumentality, to wit, a State-wide system of highways of approximately fifty-five hundred miles "of hard-surfaced and other dependable roads." Third. In order that there might be no confusion as to the immediate objects of this service the act designated them by name, to wit, all county seats, all principal towns, State parks and principal State institutions. Fourth. The highway system should serve these designated institutions by the most "practical routes."

Let it be observed in passing that the service by the highway system to the designated institutions is the controlling idea, and the "practical route" is subordinate to the larger idea of the service to be rendered.

To the end that there might be no uncertainty as to how the highway system should be made up, the Legislature adopted a map showing in detail the roads which it proposed should "constitute the State highway

system." The map, therefore, became as solemn and binding legislative declaration as any other paragraph, phrase or clause of the road law.

Having defined the service to be rendered, and having created a system of roads as an instrumentality for promoting and guaranteeing the service contemplated, and having designated the immediate objects of the service, the Legislature created an administrative body known as the Highway Commission to execute its program so formulated.

Realizing that in order to execute with economy and efficiency the program of improvement, it delegated certain discretion to the Highway Commission in these words: "The roads so shown can be changed, altered, added to or discontinued by the State Highway Commission." Realizing further that this discretion, so delegated, should be limited and safeguarded, in so far as it affected the immediate objects of the service to be rendered by the road system, the Legislature said, in effect, that no road serving a county seat should be altered or discontinued so as to withdraw therefrom the service of the highway system.

The exact language of the limitation is: "*Provided*, no road shall be changed, altered or discontinued so as to disconnect county seats," etc.

Acting in obedience to power conferred upon it by the road law, the defendant, Highway Commission, adopted as a part of the State highway system the road between Statesville and Newton and took charge of said road and maintained the same as a part of route 10. This road entered the town of Newton in the southeastern portion and passed by the courthouse and along the principal street through the center of the town, and thence to Hickory over the present hard-surfaced road from Newton to Hickory. The defendant now proposes to abandon this road and to construct a new road from the center of Statesville to connect with the hard-surfaced road running from Newton to Hickory. This proposed road would enter the town of Newton just inside of the corporate limits of said town on the northern side, and at a distance of about 1⅛ of a mile from the courthouse. The plaintiff thereupon instituted this action to restrain the defendant from constructing said road in the manner proposed, alleging in substance that the new road was a total abandonment of the present road, and, in addition thereto, that the new road, as proposed, skirted the town of Newton, touching it only near its northern limits, and that this action was contrary to law and would result in irreparable damage to the plaintiff and deprive it of the benefit to which it was entitled. The trial judge found the facts, which will appear from an examination of the judgment rendered, and which may be recapitulated in brief as follows: (1) That the proposed road, known as the northern route, is 1.39 of a mile shorter than the present road; that the cost of grading and constructing the road on the northern route would be less than on the southern, but, if the northern

route were adopted, it would be necessary to build a new bridge across the Catawba River, which would require a considerable expenditure of money. (2) That the said northern route or proposed route runs from the center of Statesville to a point *just inside of the corporate limits of the town of Newton* and $1\frac{1}{8}$ of a mile from the courthouse or center of the town, *"leaving the whole town of Newton to the south."*

We now approach the front line trenches of the litigants, where the issue is to be fought out and determined.

The defendant takes up its position behind what is known in the law as the doctrine of discretion, which consists of those discretionary powers which can be exercised by administrative boards and with which the courts cannot interfere. The principle is expressed thus: "In numerous and repeated decisions the principle has been announced and sustained that courts may not interfere with discretionary powers conferred upon these local administrative boards for the public welfare unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion." *Newton v. School Committee*, 158 N. C., 186. This principle is woven into the law by a long and unbroken line of decisions, beginning with *Brodnax v. Groom*, 64 N. C., 244. But it must be observed that these discretionary powers must be conferred on the local administrative board or result from necessary implication. The proviso of section 7 of the Road Act, in express language, not only fails to confer a discretion as to county seats, but, in positive language, actually withdraws it. When a statute speaks plainly and in no uncertain or ambiguous terms, the voice of discretion cannot be heard; otherwise administrative boards, under the guise of discretion, could set at nought the legislative will and clothe themselves with the attributes of sovereignty. That this is the correct interpretation of the law appears from the opinion of *Adams, J.*, in the case of *Cameron v. Highway Commission*, 188 N. C., p. 88, in these words: "As we understand it, the very purpose of this proviso was to exclude the construction that, as to the roads therein described, the defendants should have the discretionary power upon which they now insist. In the exercise of a legal discretion they may determine whether a road shall be changed, altered or discontinued if they observe the mandate of the proviso. But this mandate must be observed; and if it be granted that county seats, State parks, national parks, and forest reserves may be identified *ex vi termini*, it is not so with respect to 'principal towns' or principal State institutions."

The defendant plants itself behind the *Cameron case*. It must be observed at the outset, in analyzing the *Cameron case*, that it was dealing with the question of "principal towns" only, and not with the question of county seats. The *Cameron case* held that "the decision as to

what are principal towns within the meaning of the act is a mixed question of law and fact, subject to judicial review as it ordinarily prevails in such cases," because "principal towns" cannot be identified *ex vi termini*. But this reasoning does not apply to county seats because county seats have a fixed meaning in the law and are identified *ex vi termini*. Therefore, the reasoning of the *Cameron case* has no application here, and the learned justice who wrote the opinion, had in mind that a different principle of law would apply to a county seat when he used this language: "and if it be granted county seats, State parks, national parks, and forest reservations may be identified *ex vi termini*, it is not so with respect to principal towns or State institutions."

It is clear, then, that upon this aspect of the controversy the *Cameron case* not only fails to support the defendant's contention, but actually supports the contrary view.

The *Cameron case* very properly holds that the road map, adopted by the Legislature as a part of the road law, was tentative, but it also holds that this road map was not tentative in so far as it related to the service to be furnished by the road system to county seats. This idea is thus expressed in the opinion: "The terms of the proviso are positive and mandatory and not uncertain or discretionary. . . . Nothing else appearing, this clause would probably be construed as conferring powers to be exercised in the discretion of the defendant, but immediately following are the words: '*Provided*, no roads shall be changed, altered, or discontinued so as to disconnect county seats,' " etc. In other words, the obvious meaning of the statute is that any road shown on the map may be changed or altered in the discretion of the Highway Commission except that no road as shown on the map shall be changed, altered or discontinued so as to disconnect county seats.

The whole proposition, therefore, resolves itself, in the final analysis, to a determination of the question of whether or not the proposed road entering the town of Newton just within its outmost limits or boundaries is in effect disconnecting the county seat.

When the defendant completed its road to Statesville, the next legal objective was Newton because Newton is the next county seat to the west. By the ordinary processes of reasoning, it must be assumed that an objective created by law was of such outstanding importance as to require and command the full service of the highway system. The Road Act required these highways to run "to all county seats." "Running to a county seat" is quite different from running around a county seat. In *Farmers Turnpike Road v. Coventry*, 10 Johnson (N. Y.), 389, the principle was thus declared: "The plaintiffs, by their charter, were entitled to carry the road 'to the city of Hudson.' This did not

mean that the road was to terminate on arriving at the north bounds of the city, which are the middle of Major Abraham's Creek, and several miles from the compact part of the city. The words are to receive a more reasonable interpretation, in reference to the subject-matter, and the public object of the grant, which was to open a good road from Troy to the compact part of the city of Hudson." This case has been cited with approval in *People v. Flammer,* 137 Mich., 399; *Rio Grande R. R. v. Brownsville,* 45 Texas, 88; *Central Ga. R. R. v. Union Springs R. R.* (Ala.) ; 2 L. R. A., N. S., 144.

In reply to this proposition, however, the defendant insists that when its proposed road actually enters the corporate limits at a point just inside thereof, it has complied with the law, and, to that extent, is just inside the law. If the reasoning of the defendant is sound, in giving a technical, restricted, and literal construction to the words: "connecting the various county seats," then there is no necessity for running these highways into the corporate limits of the county seats at all. The intent of the statute, by such reasoning, would be fully complied with by running these great highways so as to connect with a road that did connect with the street system of the town, and therefore a county seat could be "connected" even though the highway system did not come within one mile or ten miles of its boundaries. If it be conceded that this is a compliance with the letter of the law, it must also be borne in mind that "the letter killeth, but the spirit giveth life."

The defendant insists that it would cost approximately two hundred thousand dollars ($200,000) more to build the southern route as shown on the map, referred to, than the northern route which it proposes, and, therefore, that, as a public agency, it should conserve public money. This is undoubtedly a sound proposition. But if the road law required these roads to serve the county seat, in accordance with the legislative plan, then the question of expense is one for the Legislature and not for the courts or the Highway Commission. In addition, the argument cannot be successfully maintained that, because it is cheaper to disobey the law than to observe it, therefore disobedience is justifiable.

It is also urged by the defendant that radical departures have been made in other county seats in the State. There is no finding of fact in regard to this in the record; but, assuming that this has been done, prior departures from the law cannot be used as a reason for a failure to comply with the mandate of the statute.

The final contention of the defendant is that the construction of the road, as proposed by it, does not disconnect the town of Newton.

All the county seats in the State, including the town of Newton, were connected by a road system. The statute itself, speaking through a map,

made the connection in a definite and certain manner. What the statute hath joined together the defendant cannot put asunder.

We conclude that the Road Act itself connected the county seats according to the best judgment of the Legislature. A substantial departure from such connection so made by the sovereign power of the State must, of necessity, constitute a disconnection.

We hold, therefore, that the spirit of the Road Act contemplated that all county seats in North Carolina should be served by the highway system substantially as designated on the map, and that the road, as proposed by the defendant, is not a substantial compliance with the true intent and meaning of the road law.

The trial judge properly held that "the court cannot direct the location of the road." And while slight deviations might be permissible in the interest of the regulation of traffic or other controlling problems of engineering, yet the plaintiff is entitled, under the law, to the service of the road system, which would logically result from a substantial compliance with the location as fixed by the Legislature.

Judgment affirmed.

STACY, C. J., dissenting: The State Highway Commission is an agency of the State, charged with the duty of exercising certain administrative and governmental functions, chiefly those enumerated in C. S., 3846(j). *Latham v. Highway Commission,* 191 N. C., 141; *Road Commission v. Highway Commission,* 185 N. C., 56; *Carpenter v. R. R.,* 184 N. C., 400. And it is a statement of public policy so firmly embedded in our law as to amount almost to an axiom to say that when a State agency, clothed with administrative and governmental authority, acts within the law, and deals officially with a matter duly submitted for its decision, the courts are not permitted to interfere with its judgment or to control its discretion, except in case of oppression or manifest abuse, when there is no appeal from its judgment as allowed by statute. *Cameron v. Highway Commission,* 188 N. C., 84; *Peters v. Highway Commission,* 184 N. C., 30; *Cobb v. R. R.,* 172 N. C., 61; *Edwards v. Comrs.,* 170 N. C., 448; *Supervisors v. Comrs.,* 169 N. C., 548; *Newton v. School Committee,* 158 N. C., 186; *Howell v. Howell,* 151 N. C., 575; *Board of Education v. Comrs.,* 150 N. C., 124; *Rosenthal v. Goldsboro,* 149 N. C., 128; *Glenn v. Comrs.,* 139 N. C., 412.

"Who made us judges over such matters?" *Supervisors v. Comrs.,* 169 N. C., 548.

Speaking to the identical question in *Peters v. Highway Com.,* 184 N. C., 30, the late *Chief Justice Clark* said: "The courts are not empowered to supervise the action of administrative boards because of a

difference of opinion as to the action taken or contemplated by the officials charged with the duties of administration." And in the same case the following was quoted with approval from the opinion of *Hoke, J.*, in *Newton v. School Committee*, 158 N. C., 186: "In numerous and repeated decisions the principle has been announced and sustained that courts may not interfere with discretionary powers conferred on these local administrative boards for the public welfare unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion (citing authorities). In some of the opinions, decided intimation is given that in so far as the courts are concerned the action of these administrative boards must stand unless so arbitrary and unreasonable as to indicate malicious or wanton disregard of the rights of persons affected. It is undesirable and utterly impracticable for the courts to act on any other principle."

The leading case in our Reports is probably that of *Braxton v. Groom*, 64 N. C., 244, decided in 1870. What was said in that case is especially applicable here, for there, as in the instant suit, it was sought to enjoin commissioners, charged with the duty of deciding the question, from exercising their judgment in regard to providing means for building bridges "where none had been before—not connected with any public road," hence, alleged to be "unnecessary and otherwise extravagantly expensive." *Pearson, C. J.*, writing the opinion of the Court, said: "So the case before us is within the *power* of the county commissioners. How can this Court undertake to control its *exercise?* Can we say such a bridge does not need repairs; or that in building a new bridge near the site of an old bridge it should be erected as heretofore, *upon posts*, so as to be cheap, but warranted to last for some years; or that it is better policy to locate it a mile or so above, where the banks are good abutments, and to have *stone pillars*, at a heavier outlay at the start, but such as will insure permanence, and be cheaper in the long run? In short, this Court is not capable of controlling *the exercise* of power on the part of the General Assembly, or of the county authorities, and it cannot assume to do so, without putting itself in antagonism as well to the General Assembly as to the county authorities, and *erecting a despotism of five men:* which is opposed to the fundamental principles of our government and the usages of all times past. For the exercise of powers conferred by the Constitution the people must rely upon the honesty of the members of the General Assembly and of the persons elected to fill places of trust in the several counties. This Court has no power, and is not capable if it had the power, of controlling the exercise of power conferred by the Constitution upon the legislative department of the government or upon the county authorities."

This case has been followed and cited with approval in *Wilson v. Charlotte*, 74 N. C., 759; *London v. Wilmington*, 78 N. C., 109; *Ashcraft v. Lee*, 79 N. C., 35; *Evans v. Comrs.*, 89 N. C., 158; *Tate v. Greensboro*, 114 N. C., 392; *Vaughan v. Comrs.*, 117 N. C., 434; *Herring v. Dixon*, 122 N. C., 422; *Stratford v. Greensboro*, 124 N. C., 132; *Black v. Comrs.*, 129 N. C., 125; *Wadsworth v. Concord*, 133 N. C., 594; *Small v. Edenton*, 146 N. C., 527; *Peters v. Highway Commission, supra*, and many others too numerous to be mentioned, probably two hundred in all. See Shepard's Citations and Allen's Reported and Cited Cases, 1926.

Plaintiffs do not allege that the State Highway Commission has abused its discretion in relocating the road from Statesville to Newton, but they seek to restrain its action in the present proceeding solely upon the ground that, in relocating said road, two county seats have been disconnected in violation of chapter 2, Public Laws 1921, which provides that the proposed roads, shown upon the map attached to said act, may be "changed, altered, added to or discontinued by the State Highway Commission: *Provided*, no roads shall be changed, altered or discontinued so as to disconnect county seats, principal towns, State or national parks or forest reserves, principal State institutions and highway systems of other states."

It is conceded that the northern route as proposed by the State Highway Commission comes in physical contact with the paved-street system of Statesville, the county seat of Iredell County, and with the paved-street system of Newton, the county seat of Catawba County, and reduces, not only the cost of road construction and maintenance, but also the distance between the two places by 1.39 miles over the southern route, for which the plaintiffs contend. How, then, can it be said, *as a matter of law*, that the two county seats will be disconnected by the proposed change, when in fact they will still be connected by the highway? How is it practical to connect two county seats or principal towns with a highway, except by making physical contact with the street systems of the two places? It is the declared purpose of the Legislature that the various county seats and other principal towns shall be connected "by the most practical routes," such practical routes to be determined and established by the State Highway Commission.

But it is said that the road as proposed by the State Highway Commission is not a substantial compliance with the statute which requires the various county seats and other principal towns to be *connected* by the most practical routes, and that the change, as contemplated, will have the effect of *disconnecting* the two county seats in violation of the proviso above quoted. If it be conceded that the primary purpose in

building the road from Statesville to Newton is to connect these two county seats, then the only practical difference between the two routes, so far as concerns a traveler going from the courthouse in Statesville to the courthouse in Newton, is that on the northern route he would approach the town of Newton from the north and drive down main street to the courthouse, whereas on the southern route he would approach the town of Newton from the south and drive up main street to the courthouse, and returning, he would retrace his steps on either route.

If local connections, therefore, are to be given primary consideration in selecting the routes, what local objections can be made to the road as proposed by the State Highway Commission? The objections, it seems to me, are not based on any failure to make local connections, but rather on the ground of through travel; and it should be remembered that the statute provides for a State system of dependable roads as well as for local connections.

However, going from courthouse to courthouse is admittedly not the test of connecting two county seats in building the State system of highways. And it is correctly said in the majority opinion that the commission may make changes so as to avoid traffic congestion in the various county seats, principal towns, etc., from which it would seem to follow, as a necessary corollary, that the exact location of the different roads going to make up the State system, is a matter which rests, and was intended by the Legislature to be lodged, in the sound discretion of the State Highway Commission, limited only by the terms of the previous laws set out. This is the meaning of the statute as I understand it.

Lincolnton, the county seat of Lincoln County, is southwest of Newton, while Hickory, one of the principal towns of Catawba County, is northwest of Newton, and Statesville is northeast of Newton. All of these places must be connected with the State highway system. The Statesville-Newton-Lincolnton road, as proposed by the State Highway Commission, passes directly through the town of Newton. But if the plaintiffs' view is to control, this road will touch only the southern part of the town of Newton, as the proposed Statesville-Newton-Hickory road touches only the northern part of the town of Newton. At present the main line of travel is over the Statesville-Newton-Hickory road, but, if in time this should shift to the Statesville-Newton-Lincolnton road, what would then be the attitude of Newton towards the southern route? The plaintiffs are now interested in having the principal line of travel pass over the main street of Newton and in front of the courthouse, but a few years hence may, in all probability, Newton, like many other places in North Carolina, will be confronted with the problem of traffic congestion. Then what? Shall not the commission look to the future?

Likewise, the Lincolnton-Newton-Hickory road runs through the heart of Newton. Hence, in no sense can it be said, as a matter of law, that Newton is not connected with the Statesville-Newton-Hickory road, or the Lincolnton-Newton-Hickory road; the two roads meet within the corporate limits of the town of Newton. Nor can it be held, in my opinion, as a legal conclusion, that Newton and Statesville will be *disconnected* by the proposed change.

The commission was fully warranted in believing, and the Attorney-General in so advising, that the location of the road as proposed was a sufficient compliance with the law as declared by this Court in the recent cases of *Cameron v. Highway Commission,* 188 N. C., 84, and *Road Commission v. Highway Commission,* 185 N. C., 56. In both of these cases, substantial departures from the roads designated on the map attached to the act of 1921, were sanctioned and approved, because such "proposed roads" were only tentative, and the State Highway Commission was expressly authorized to "change, alter, add to, or discontinue" any of the proposed roads shown upon the legislative map, subject only to the limitation contained in the proviso above set out.

But it is now said, "the spirit of the Road Act contemplated that all county seats in North Carolina should be served by the highway system substantially as designated on the map." If the Court means by this to overrule, or to modify, what was said in *Cameron v. Highway Commission, supra,* and *Road Commission v. Highway Commission, supra,* I think it should specifically call attention to the fact, so that the State Highway Commission and its legal advisers may know how to proceed in the future. If all the roads going to make up the State highway system have been located in advance by legislative fiat, "substantially as designated on the map," and such is the Court's interpretation of the statute, the authorities, or those charged with the building of the roads, ought to know it so that the highway engineers may understand the limitations within which they must work.

If all the county seats in the State are to be served by the highway system substantially as designated on the map, then the authority of the State Highway Commission to "change, alter, add to, or discontinue" any of the proposed roads shown upon said map, must be understood as limited by a double, rather than a single, proviso, as follows: *Provided,* no roads shall be changed, altered or discontinued so as to disconnect county seats, principal towns, etc. *Provided further,* that all county seats shall be served by the highway system substantially as designated on the map.

I cannot think the Legislature intended to locate all the roads going to make up a great State system, or even those connecting the county seats, by the simple device of drawing lines upon a map. This would

be a species of legislative engineering utterly at variance with every consideration of wisdom and economy in the construction and building of highways. The different roads were designated on the map wholly without regard to the topography of the country. Straight lines were drawn across rivers, swamps and mountains as they appear on the map, with no regard for exact location, and surely the Legislature did not intend for the roads to follow these lines, not even substantially so, if other routes connecting the various county seats, principal towns, etc., were more practical. Section 7 of the act contains express provision to the contrary.

In the instant case, the northern route is shorter and more economical than the southern route. They both connect Statesville with Newton, and *vice versa*. Tested by the standard of substantial compliance with the map, I am unable to see wherein the Legislature has forbidden the selection of the route as proposed by the State Highway Commission.

It is conceded that, from the standpoint of through travel, the position of the plaintiffs in favor of the southern route is not without its strength of appeal, if Newton is entitled to have such travel routed over its principal street. But the reasons advanced by the plaintiffs were not deemed convincing or compelling in the forum charged with the duty of deciding the matter. Nor was it thought that all consideration for through travel should be sacrificed to local advantage, if such it be.

These arguments are mentioned only to show that the question presented is one to be determined, primarily and in the first instance at least, by the State Highway Commission in the exercise of a sound, but not arbitrary, judgment. Indeed, the determination of such matters is a part of the duties and responsibilities imposed upon it by the statute under which it was created. *Cameron v. Highway Commission,* 188 N. C., 84.

Let it be observed that this is not an appeal from a decision of the State Highway Commission, as authorized by C. S., 3846(p), nor are we passing in review on the wisdom or impolicy of the action of the Commission in relocating the road in question. Either route might have been selected, without objection, so far as the law is concerned. Our duty, in a proceeding like the present, begins only where the authority of the Commission ends. The question before us is not whether we agree with its decision, but is it lawful? We are passing upon the legality of its act, and nothing else.

I think the plaintiffs have failed to make out a case calling for judicial interference or injunctive relief, and, for the reasons given, I must dissent from the decision of the majority.

ADAMS, J., concurs in dissenting opinion.

PEOPLES NATIONAL BANK OF WINSTON-SALEM, N. C., v. SOUTHERN STATES FINANCE COMPANY AND J. H. MACKIE.

(Filed 9 June, 1926.)

1. Banks and Banking—Officers—Ultra Vires Acts.

A bank existing under the State or Federal law is only authorized to conduct its business under the limitations therein imposed, and the acts of its officials beyond these limits are *ultra vires.*

2. Same—Liability.

A bank is not liable for the *ultra vires* fraudulent acts of its officials in furnishing information to its customer as to the financial standing of those local to the place in which the bank conducted its business.

3. Same—Evidence.

Evidence is insufficient to make a bank liable for the *ultra vires* acts of its officers who receive compensation for the information as to the financial responsibility of persons within the locality in which the bank conducts its business.

4. Same—Presumptions.

Those dealing with a bank are conclusively presumed to know that the *ultra vires* acts of its officials will not be binding on it.

5. Same—Burden of Proof.

A bank is not liable for the *ultra vires* acts of its officials beyond the benefit it has actually received thereby, the burden of proof being on the plaintiff.

CLARKSON, J., dissenting.

APPEAL by plaintiff from *Schenck, J.,* at May Term, 1925, of FORSYTH. New trial.

On 26 February, 1924, J. H. Mackie, of Yadkin County, North Carolina, executed his note, due six months after date, payable to Southern States Finance Company, of Charlotte, N. C., or order, for $16,500, negotiable and payable at the Peoples National Bank of Winston-Salem, N. C. This note, together with a subscription for 1,650 shares of stock of the Southern States Finance Company, was delivered by J. H. Mackie to S. F. Penry, who had, as agent for the Finance Company, solicited the said subscription. The consideration for the note was the purchase price of the stock. It was agreed between Mackie and Penry that if the subscription and note were not accepted by Southern States Finance Company, and if the certificates were not issued, the note should be returned to Mackie. Thereafter, Penry submitted the subscription and the note to Southern States Finance Company at Charlotte.

The Southern States Finance Company communicated by telephone with Col. W. A. Blair, vice-president of the Peoples Bank of Winston-

Salem, N. C., in order to secure information upon which to determine whether or not it would accept said note, and issue the certificates for the stock to J. H. Mackie. After several phone conversations with Colonel Blair, relative to Mackie and the note, then in its possession, Southern States Finance Company endorsed the note, and sent it by Penry to plaintiff at Winston-Salem. Plaintiff issued certificates of deposit, aggregating $16,500, payable to Southern States Finance Company, and delivered same to Penry. Penry thereupon delivered the note, with the endorsement of Southern States Finance Company, to plaintiff. Penry then took the certificates of deposit to Charlotte and delivered same to Southern States Finance Company. The Finance Company thereupon issued certificates of stock, in accordance with his subscription, to J. H. Mackie. These certificates of stock were delivered by Penry to Mackie, at his home in Yadkin County. The certificates of deposit have been paid by plaintiff.

This is an action by plaintiff, as holder of the note, to recover of J. H. Mackie, as maker, and of defendant, Southern States Finance Company, as endorser, the sum of $16,500 and accrued interest. No answer was filed by defendant, J. H. Mackie.

Southern States Finance Company, in defense of plaintiff's action upon said note, says:

1. "That on and for some time prior to 26 February, 1924, plaintiff, Peoples National Bank of Winston-Salem, N. C., was the regular depository of this defendant in which defendant kept on deposit a considerable portion of its funds, and the vice-president of plaintiff, who has active charge of its affairs, was a member of the advisory board of this defendant, as representative of the plaintiff bank, and according to the course of business of this defendant, it submitted to the plaintiff bank and to its said vice-president all paper which it took in the regular course of business from the vicinity in which plaintiff bank did business, and this defendant was accustomed to rely and did rely, upon the information given it by the plaintiff bank and its said vice-president with regard to the financial standing and responsibility of persons in the neighborhood of plaintiff bank from which this defendant purchased all papers and securities, and for the service and information rendered by the plaintiff and its said vice-president, the plaintiff was duly compensated by this defendant, and this defendant had a right to rely upon information received by it from the plaintiff."

2. "That the plaintiff, well knowing the confidence reposed in it by this defendant, abused the confidence of this defendant in the matter of the endorsement hereinbefore described, and as this defendant is informed and believes, conspired and agreed with certain persons against

whom it held insolvent papers to obtain security for a certain unsecured indebtedness at the expense of this defendant, and with intent to cheat and defraud this defendant, made false and fraudulent representations to this defendant, and obtained from defendant the endorsement to the note of J. H. Mackie, as hereinafter more fully set forth."

3. "That prior to the said 26 February, 1924, the plaintiff held worthless and unsecured paper made or endorsed by Webb S. Alexander, J. H. Mackie, F. W. Hanes and others, aggregating approximately $16,500; that plaintiff being desirous of obtaining some security for the said worthless indebtedness, entered into an agreement with the said Alexander and others, as defendant is advised and believes, by the terms of which the said Alexander and others were to sell to the said Mackie $16,500 of stock in the Southern Finance Company, which was to be placed by Mackie as collateral to a note of the said Hanes, which was to be given in lieu of the aforesaid worthless paper; that the plaintiff was to induce this defendant to issue the said stock for the worthless note of Mackie by representing to this defendant that the said Mackie was solvent and that his said note was good, and was to obtain the endorsement of this defendant on said note by said representation, and by offering to discount same for defendant."

4. "That in pursuance of the aforesaid fraudulent scheme and conspiracy, the said Webb S. Alexander and certain of his associates did obtain the $16,500 note sued on in this action from the said J. H. Mackie, and thereupon presented same, together with a stock subscription for $16,500 stock, to this defendant; that before this defendant would accept said note, it made inquiry of the plaintiff as to the solvency and responsibility of the said J. H. Mackie and was assured by plaintiff that the said J. H. Mackie was solvent and responsible and that this defendant would be safe in taking said note in payment of his stock subscription, and agreed that if this defendant would take said note, plaintiff would purchase same from the defendant upon its endorsement; and that relying upon the said representations made to this defendant by the plaintiff, as aforesaid, this defendant issued its stock to the said J. H. Mackie in the sum of $16,500 and endorsed the note sued on to plaintiff; that this defendant thereupon delivered the said stock and the said note to one S. F. Penry, who was acting in concert with the plaintiff and the said Webb S. Alexander, to the end that the said note might be delivered to the plaintiff and that the stock might be pledged as security to the said note, defendant assuming and believing that the said stock would be placed with plaintiff as security for the note given for the purchase price of said stock, but this defendant has recently learned that the plaintiff did not place the said stock as security to the said note given for its purchase price, as aforesaid, but allowed same to

be placed as security for a note of one F. W. Hanes, which note was given to take up the aforesaid worthless paper given by Mackie, Hanes, Webb S. Alexander and others, as aforesaid, and that plaintiff thereupon held the said $16,500 note signed by defendant Mackie without any security whatever for the payment of same, except the endorsement of this defendant obtained in the fraudulent manner aforesaid."

5. "That at the time plaintiff obtained from this defendant its endorsement on the said promissory note, the said J. H. Mackie was not solvent or responsible, and his credit was not good for $16,500, but, on the contrary, he was involved in debt and insolvent, and his note was worthless, as the plaintiff then and there well knew; that the plaintiff made the aforesaid false representations as to the solvency and responsibility of the said J. H. Mackie for the purpose of deceiving and defrauding this defendant, and by means thereof did deceive and defraud and obtained from this defendant the issuance of said stock and endorsement aforesaid, all to the great damage of this defendant and in breach of the trust and confidence reposed by this defendant in the plaintiff."

6. "That in the manner and way aforesaid the plaintiff obtained from the defendant its endorsement on the worthless note of J. H. Mackie for the sum of $16,500, and also obtained $16,500 of the stock of this defendant as collateral security to the aforesaid worthless loans which it held and for which the practically worthless note of F. W. Hanes, secured by the aforesaid stock, was exchanged as aforesaid; that after obtaining the said stock of the said Mackie, as this defendant is informed and believes, plaintiff proceeded to allow the said Webb S. Alexander to sell said stock or a large portion thereof, and applied the proceeds on the said note of Hanes given for said worthless indebtedness."

7. "That it was understood and agreed at the time the said stock was issued to J. H. Mackie, that same should be pledged as collateral to the note of the said J. H. Mackie purchased by the plaintiff as aforesaid, and this defendant is informed and believes that the said J. H. Mackie did put up said stock as collateral to said note and this defendant avers that this plaintiff, by relinquishing its rights against said stock as security to this note, has discharged this defendant from liability on its endorsement."

Plaintiff, in its reply to the answer, denied the allegations set out therein and "avers upon information and belief that there was some arrangement by which Col. W. A. Blair, who was vice-president of plaintiff, would answer, when requested, inquiries about notes and mortgages on automobiles which might be purchased by the Southern States Finance Company from makers residing in the city of Winston-Salem

only as to the reputation and general standing of the persons inquired about, for which he was to receive a small amount in comparison for his services, when the particular note was paid off to or canceled by the Southern States Finance Company; that this plaintiff had nothing to do with the private arrangement between Col. W. A. Blair and the Southern States Finance Company, and if any consideration was promised or paid for such information as was given by Col. W. A. Blair, this plaintiff received no part thereof."

The issues submitted to the jury, with answers thereto, are as follows:

"1. Was the endorsement of the defendant, the Southern States Finance Company, upon the note described in the complaint, procured by means of false and fraudulent representations of the plaintiff, the Peoples National Bank, through its officers or agents, with intent to cheat and defraud this defendant, as alleged in the answer? Answer: Yes.

"2. Was the endorsement of the defendant, the Southern States Finance Company, upon the note described in the complaint, procured by means of conspiracy to defraud the said defendant, made and entered into by the plaintiff, the Peoples National Bank, through its officers or agents with Webb S. Alexander and others, as alleged in the answer? Answer: No.

"3. Did the plaintiff, the Peoples National Bank, through its officers or agents, agree with the defendant, the Southern States Finance Company, through its officers or agents, that the stock issued by the defendant to J. H. Mackie should be pledged as collateral to the note described in the complaint; and, in violation of such agreement, fail to hold said stock as such collateral, as alleged in the answer? Answer: Yes.

"4. What amount, if any, is the plaintiff, the Peoples National Bank, entitled to recover of the defendant, the Southern States Finance Company? Answer: Nothing."

Upon the verdict judgment was rendered that plaintiff recover nothing, in this action, of defendant, Southern States Finance Company, and that said company go without day and recover of plaintiff its costs. From this judgment plaintiff appealed to the Supreme Court, assigning errors based upon its exceptions as set out in the case on appeal.

Swink, Clement & Hutchins and Holton & Holton for plaintiff.
Parrish & Deal, T. L. Kirkpatrick and H. L. Taylor for defendant.

CONNOR, J. Defendant admitted, in its answer, the execution by J. H. Mackie, and the endorsement by the Southern States Finance

Company, of the note set out in the complaint. This note contains the following provision: "Each drawer, endorser, or surety hereby severally waives presentment for payment, notice of protest, or of nonpayment by principal, and hereby agrees to any extension of time given to them or either of them." The note bears the following endorsement: "Pay to the order of Peoples Bank at Winston-Salem, N. C., Southern States Finance Company. J. R. Cherry, Treas." It is admitted that the principal has not paid the note; defendant, Southern States Finance Company, by reason of its endorsement, is liable to plaintiff on the note, unless the defense set up in its answer relieves it of such liability. By its endorsement and waiver it engaged that upon dishonor by failure of the principal to pay the note when due, it would pay the same. C. S., 3047. The burden of establishing, by evidence, the facts relied upon in said defense is upon the Southern States Finance Company.

J. R. Cherry, witness for defendant, testified: "I am secretary and treasurer of the Southern States Finance Company. I had a conversation with Colonel Blair over the phone prior to 6 March, 1924, before writing a letter to him of that date. I called the Peoples Bank of Winston-Salem and asked for Colonel Blair. I told Colonel Blair that Mr. Penry had called on us in behalf of a party living in the vicinity of Winston-Salem who wanted some of our stock; that we knew nothing of this party and wanted him to get a line on the party for us. I told Colonel Blair that the man in question was J. H. Mackie, of Yadkin. He said he knew Mr. Mackie; he had not been in close touch with him for some time, but he knew of two lawyers in Winston-Salem who had recently done some work for him. He was sure he could get a good report from them. Colonel Blair said that these two lawyers were Mr. Hall and Mr. Holton. He said he would get a report and call us later. At the expiration of about an hour and a half Colonel Blair called back and said he had been out to see Mr. Hall and Mr. Holton; that they both said that Mr. Mackie was possessed of considerable property, was a man of good standing, of good reputation; that he had the reputation of meeting his contracts as made.

"We did not handle the proposition at that time. Later in the afternoon we called Colonel Blair again, and told him that there was another phase of the transaction we hadn't got straight; that we understood his bank was going to purchase this note. He said, 'Well, I will have to look further into that phase of it.' He called us back later, and said he would purchase the note. We endorsed the note and sent it to Winston-Salem by Mr. Penry. That was on Monday, 3 March, 1924. On said day I wrote a letter addressed to 'Col. W. A. Blair, vice-president, Peoples National Bank, Winston-Salem, N. C.,' as follows:

" 'Today we have endorsed a note to J. H. Mackie, of Yadkinville, in the sum of $16,500 to the order of your bank, which was given to us for a like amount of common stock in this company. The purpose of this letter is to insure this company against any possible miscarriage of certificates of deposit on your bank in lieu of said note and which we would thank you to issue to us as follows: Seven certificates for $2,000 each, and the balance of $2,500 in one certificate.

" 'The party making this purchase is undoubtedly a responsible one, but in view of his residence being somewhat removed from the place of our location, we thought it best to take this means of apprising you of the transaction and in making the request that you send the certificates for this note when presented, and which we understand will be done through Mr. Penry.'

"On 6 March, 1924, we received letter from Colonel Blair, of that date, acknowledging receipt of my letter. On said date I wrote Colonel Blair, vice-president, Peoples National Bank, as follows:

" 'Since hearing from you over the long-distance telephone today we had a call from Mr. Penry bringing in the certificates of your bank for $16,500 in lieu of the note for the same amount made by J. H. Mackie.

" 'In view of the fact that your bank has issued the certificates and because of the favorable information you have received about Mr. Mackie's responsibility, we have concluded that you were satisfied in the matter and accordingly we have issued the stock to Mr. Mackie. We will thank you to confirm our understanding from you that you regard the paper as being all right.'

"The Peoples National Bank was a member of our Advisory Bank, and Colonel Blair of the bank was the officer in the bank who was to furnish us information. The advisory board contract was in writing. The Peoples National Bank was our depository in Winston-Salem. We carried funds on deposit, and the bank made installment collections as they became due.

"There was no conversation between me and Colonel Blair as to what was to be done with the certificates of stock issued to Mr. Mackie. I told Colonel Blair that the stock was to be held by his bank behind the Mackie note until the note was paid. I mean by 'behind the Mackie note,' in a measure collateral. I suppose you would say as a collateral note. It was to be held as security to the note; the note, however, was not a collateral note. I gave the certificates issued to Mackie to Penry to take to the bank."

There was evidence offered by defendant tending to show that in February, 1924, J. H. Mackie, F. W. Hanes, Webb S. Alexander and others

who had been associated with them in business transactions, were indebted to plaintiff as makers or endorsers on various notes aggregating $15,590.56, held by plaintiff. That these notes were due and that plaintiff had brought suit in the Superior Court of Forsyth County to recover the amounts due on said note. All of these notes were paid on 10 March, 1924, from the proceeds of a note for $16,500 dated 29 February, 1924, executed by F. W. Hanes and payable to plaintiff. This note was secured by the certificates of stock issued by defendant to J. H. Mackie. These certificates were delivered by Mackie to Hanes, who attached same to his note and then delivered his note with said certificates attached thereto, to Alexander. Alexander delivered the note and certificates to Colonel Blair, vice-president of plaintiff, who accepted the same in payment of the notes of Mackie, Hanes, Alexander and others held by plaintiff. A payment has been made on the Hanes note from the proceeds of the sale of the certificates deposited as collateral thereto.

There was also evidence offered by defendants tending to show that in February, 1924, and for some time prior thereto, J. H. Mackie was insolvent; that many judgments aggregating a large sum had been docketed against him in Yadkin County; that executions on some of these judgments had been issued and returned unsatisfied; that he was a man of good character and reputation; that he was in possession of considerable real estate of large value, the title to which was in his wife and children. He was at one time treasurer of Yadkin County. Both Messrs. Holton and Hall, as witnesses for defendant, testified that in February, 1924, Colonel Blair saw them on the streets of Winston-Salem, and asked each of them as to the general character of J. H. Mackie; that each told Colonel Blair that Mackie was regarded as a man of good character; that neither of them told Colonel Blair that Mackie was solvent.

There was also evidence that the certificates of stock issued to J. H. Mackie by the Southern States Finance Company were delivered to Mackie at his home in Yadkin County by S. F. Penry, together with a letter dated 6 March, 1924, signed by the president of defendant company and containing the following paragraph:

"We are pleased to extend to you a hearty welcome as a stockholder in this corporation, having just received your subscription for $16,500 worth of our common stock, which we are sending to you with this letter."

There was much additional evidence relied upon by defendant to sustain its contentions. Plaintiff offered evidence tending to contradict witnesses for defendant in many respects and to rebut inferences which

defendant contends that the jury might draw from all the evidence. We do not deem it necessary for a decision in this case to set out this evidence.

Plaintiff assigns as error the refusal of the court to allow its motions, made first at the conclusion of defendant's evidence, and upon being then overruled, renewed at the conclusion of all the evidence, for judgment as of nonsuit upon defendant's defense to its action on the note, set out in the complaint, and for judgment, upon the admissions in the pleadings, that plaintiff recover of defendant in accordance with its prayer.

The gist of the defense, relied upon by defendant, and submitted to the jury upon the first and second issues, is the allegation that plaintiff, in violation of the confidence which it knew defendant had in plaintiff, by reason of their relations, and with intent to cheat and defraud defendant, made false and fraudulent representations to defendant, as to the solvency and financial condition of J. H. Mackie, and thereby caused defendant to issue certificates for its common stock worth $16,500, and to accept in payment therefor the note of J. H. Mackie for that sum.

Plaintiff is a corporation, organized and doing business under the National Bank Act; it has only such power as is conferred by that act. It has, pursuant to said act, power "to exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security, and by obtaining, issuing and circulating notes according to the provisions of this title." National banks have no powers beyond those expressly granted or those fairly incidental thereto. *Westervelt v. Mohrensticher*, 34 L. R. A. (N. S.), 477; 76 Fed., 118; *Myers v. Exchange National Bank*, L. R. A., 1918A 67, 96 Wash., 244, 164 Pac., 95; *Commercial Bank and Trust Co. v. Citizens Trust & G. Co.*, 45 L. R. A. (N. S.), 950, 153 Ky., 566, 156 S. W., 160; *Commercial National Bank v. Price*, 82 Fed., 802. A national bank has no power to engage in the business of furnishing to depositors or to others gratuitously or for compensation, direct or indirect, information as to the solvency, or condition or reputation, financial or otherwise, of persons, firms or corporations. An agreement to furnish such information is *ultra vires:* one, with whom a national bank may have entered into such an agreement, is presumed, conclusively, to know that he acquires no rights thereby, which may be enforced against the bank. Every one dealing with a national bank does so with notice of, and subject to, the powers conferred, and the limitations imposed by the law of its creation. *Flannagan v. Cali-*

fornia National Bank, 23 L. R. A., 836, 56 Fed., 959. A corporation, organized and engaged in the banking business, whether under the National Bank Act or under the laws of the State, can assume no liability, without acquiring assets to offset the same. The interests not only of depositors and stockholders, but also of the public, can be safeguarded only by a rigid and consistent enforcement of this salutary rule. It has been held by this Court, both upon principle and upon uniform authority to that effect, that a banking corporation cannot lend its credit to another by becoming surety, endorser or guarantor for him. *Quarries Co. v. Bank*, 190 N. C., 277. A national bank cannot lend its credit to another by becoming surety, endorser, or guarantor for him. *Merchants Bank v. Baird*, 17 L. R. A. (N. S.), 526, 160 Fed., 642. It may, however, guarantee the payment of commercial paper as incidental to its power to buy and sell the same. *Thomas v. City National Bank*, 24 L. R. A., 263, 40 Neb., 501, 58 N. W., 943. It will be held liable on an endorsement or guaranty, to the extent, at least, of the consideration, if any, which it has received. *Appleton v. Citizens Central National Bank*, 32 L. R. A. (N. S.), 543, 190 N. Y., 417, 83 N. E., 470; *Trust Co. v. Trust Co.*, 188 N. C., 766, 125 S. E., 536, 37 A. L. R., 1368. There is evidence in this record that the Peoples National Bank of Winston-Salem was a member of the advisory board of defendant, Southern States Finance Company. There is no evidence, however, tending to show what obligations plaintiff undertook to assume by the contract establishing that relation. The contract is in writing; it was not offered in evidence. There is evidence that defendant was a depositor of plaintiff; no obligation, however, arose from this relation on the part of plaintiff to furnish information to defendant as to the solvency or financial condition of Mackie. There was no relation between plaintiff bank and defendant which imposed upon the plaintiff any duty to answer inquiries about J. H. Mackie.

There is evidence that Colonel Blair, who was vice-president of plaintiff bank, had been accustomed to answer inquiries made by defendant relative to persons residing in Winston-Salem, or its vicinity, in whose notes or other obligations defendant was interested as a prospective purchaser. Some arrangement had been made by defendant with Colonel Blair for this service. There is no evidence, however, that Colonel Blair, in rendering this service to defendant, was acting or undertaking to act for plaintiff. Plaintiff had no interest in these persons, or in the notes which defendant proposed to purchase. Colonel Blair was not serving or undertaking to serve the bank, in answering defendant's inquiries. There is no evidence that at the time of the inquiry by defendant relative to Mackie, plaintiff had any interest in the note which Mackie had executed, payable to the order of defendant. In answering the inquiry

relative to Mackie, Colonel Blair was serving defendant and not the plaintiff. It was held in *Taylor v. Commercial Bank*, 62 L. R. A., 783, 174 N. Y., 181, that a bank cashier is not acting within the scope of his authority in giving information as to the value of notes executed by customers of the bank so as to render it liable in case the statements prove to be untrue. See *Bank v. Smith*, 77 Fed., 129.

The distinction between the acts of Colonel Blair when acting for defendant and when acting for plaintiff, is made clear by the testimony of Mr. Cherry, secretary and treasurer of defendant. When asked to secure information as to Mackie, Colonel Blair proceeded to act at once. When asked if the bank would purchase the note, he replied: "Well, I will have to look further into that phase of the matter." There is evidence that before giving a reply to the latter inquiry, he submitted the matter to the finance committee of the plaintiff, and replied only after the committee had authorized the purchase of the note.

We must therefore hold that upon all the evidence appearing in this record, plaintiff cannot be held liable for any loss or damage which defendant may have sustained by reason of the falsity of any representation which Colonel Blair may have made with respect to J. H. Mackie or by reason of his failure to disclose to defendant any facts within his knowledge with respect to Mackie. Defendant having failed to sustain its allegation in this respect, must fail in its defense involved in the first and second issues.

There is no evidence to sustain an affirmative answer to the third issue, which involves the allegation that plaintiff agreed to hold the certificates of stock issued to Mackie as collateral security for his note, transferred by the endorsement of defendant to plaintiff. These certificates were delivered to J. H. Mackie, and not to the plaintiff, by S. F. Penry, agent of defendant. The note was not in the form of a collateral note; the certificates were not delivered to plaintiff by defendant, and defendant's letter to J. H. Mackie, signed by its president, is evidence contradicting the contention of defendant with respect to the third issue.

There was error in the refusal of the court to allow plaintiff's demurrer to defendant's evidence offered to sustain its defense and submitted to the jury on the first, second and third issues. Upon all the evidence, the court should have directed a verdict in favor of plaintiff on all the issues. *Lester v. Harward*, 173 N. C., 83. There must therefore be a

New trial.

CLARKSON, J., dissenting.

STATE v. MELVIN MESSER.

(Filed 9 June, 1926.)

1. Homicide—Murder—Evidence—Witnesses—Physicians—Experts.

Where the evidence is conflicting as to whether the defendant killed his wife on a dark night, in a storm, upon the mountains, with a blunt instrument, or whether the numerous wounds on her person and limbs taken collectively, were sufficient to cause death in the then physical or drunken condition of the deceased, and were caused by her slipping and falling upon a rock or other substance in the dark, relied upon by the defendant, it is competent on the defendant's appeal and under his exception for a physician, qualified as an expert, to testify as to whether the number of wounds under the circumstances could cause death, and whether a blunt instrument had been used in striking the deceased, under competent evidence as to the nature and character of the wounds found upon the body.

2. Appeal and Error—Instructions—Contentions—Objections and Exceptions.

Exceptions to the statement of the contention of the parties by the judge in his instructions to the jury, cannot be sustained when not promptly taken, or after the verdict.

3. Same—Harmless Error.

Upon the trial of a homicide, when a verdict of manslaughter has been rendered, a charge upon the law of murder in the second degree becomes immaterial.

4. Appeal and Error—Instructions—Criminal Law.

Instructions on a trial for homicide will not be held for error if taken in its related parts it correctly informs the jury of the law applicable to the evidence.

5. Appeal and Error—Instructions—Evidence—Objections and Exceptions.

The failure of the trial judge to recapitulate the evidence will not be held for reversible error in the absence of a request from the appellant that he do so.

APPEAL by defendant from *Oglesby, J.*, at February Term, 1926, of HAYWOOD.

The necessary facts and assignments of error will be considered in the opinion.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Morgan & Ward and Alley & Alley for defendant.

CLARKSON, J. On Cove Creek Mountain, in Haywood County, N. C., there lived, far up the mountain, a hard-working man, the defendant,

and his wife, Lillie Messer. They had been married over a third of a century and had born to them nine children, seven living. He was 54 years old and she about the same age. The evidence tended to show that they got along very well together. He was kind to her and provided well for her. On Sunday, 17 January, 1926, about midday, defendant went to visit his son, Albert, about one-fourth to one-half mile away. He and his wife had been drinking. She came over shortly afterwards. At nearly dark they started back home in a pouring rain. It was a dark and stormy night.

Reuben Rathbone testified: "When they started off about dark she was in a staggering condition, walking tottering like. I had observed that she had been drinking whiskey. It was plain that she had had too much. I believe Melvin Messer had been drinking, but he was not drunk—he was not anything like in the condition she was in. When they went away he was leading her by the arm."

The road leading from defendant's house to his son Albert's is a sled road; it goes around the mountain.

Mrs. Frank Jenkins testified in part: "I live right down under the mountain from Melvin Messer, something like a quarter of a mile as near as I can tell—we can almost see each other's house. I was at home on Sunday night, 17 January. I know where Albert Messer lives. I know the place as the Bill Avery Messer house. I heard some hollering along in the night about ten or eleven o'clock, as near as I could tell you, and it hollered some more. The night was stormy and raining awful, and it sounded like a woman or child screaming, the best I could understand; it sounded from where I could understand over between the Bill Avery place and the Albert Messer place, on the road leading from Albert Messer's to Melvin Messer's. . . . There were bruises on her face and hands and the front part of her legs on down. I asked him how she died, and he told me about them being caught out in that awful storm and about her falling on a rock, and how he tried to carry her; said he dropped her and fell with her one time in the rain and darkness over a bank—told me it was raining so hard and was so dark that he got out of the road and fell with her; she dead. He went home and hitched up the horse and loaded her on the sled and brought her home."

J. B. Leatherwood testified in part: "On the road between Albert's house and the forks of the road there were tracks and a fruit jar that was on the bank of the road with a good drink of liquor in it; then going on from there to the next place, something like one hundred yards, there was a little dip or hollow—the road curves around. Three or four feet a fence went below the road and crossed, and there had been a

sign below the road. There I found a string tied in a bow-knot, which looked to be a garter—I have it with me (shows string to jury). It had a bow-knot tied in it right on the edge, but the bow-knot slipped off, but that is the length of the string. Then you come on out about seventy-five yards further there was a cart-way that goes around about the house. The tracks came down and then crossed the trail and went out between the road and trail to a 'tizwood' bush, and there looked like limbs had been broken off the 'tizwood' bush. Something like twelve or fourteen feet from there there was prints of person's shoulders and head in ground and the print of a man's foot up above the shoulder. Me and Messer and J. Henry and John Walker went back and found a wisp of hair in the fence sixteen feet below the rock."

It was in evidence that L. M. Messer "found some hair along on the rock and around the rock, and then he found some on a chestnut bur nine feet back up the road. I saw him scratch some hair out of the dirt in the road. Defendant said it was his wife's hair."

J. H. Franklin testified in part: "I went along and saw where it looked like some one had been struggling—saw signs of a struggle—around the other side of the Bill Avery Messer house. . . . I found there on Tuesday a wisp of hair on the wire fence sixteen feet below this rock, something like nearly as large as your finger and about that long (measuring). . . . I saw the deceased. She was bruised about the face very bad, a cut on her forehead. I didn't look particularly close, but I seen it was very bad. I saw bruises on her hands and bruises from here on down to her ankles (indicates knees) on both legs."

M. L. Messer testified in part: "I had picked up parcels of hair about the rock and about the edge of the rock, and in looking about ten feet beyond the rock there was a bunch of hair on a chestnut bur—a right smart bunch of hair. I showed that to the defendant. He said it was hers. I have got that hair with me (exhibits same). I found that hair about ten feet beyond the rock on Tuesday—we found hair in the dirt below the rock."

Defendant weighed about 175 to 180 pounds; his wife weighed about 118 or 120.

Dr. S. L. Stringfield, an admitted expert, testified in part: "Lillie Messer had something like twelve or fourteen bruises and lacerations on her face, and on her chest and arms there were something like twenty-five or thirty; she had several skins and bruises on her hands and both knee-caps were badly bruised and skinned down to her shoes, and her feet had been badly hurt. I don't have any positive way of telling just how long these bruises had been inflicted before I saw them—probably the time they said she had been dead would be about my estimate; she didn't have any particular wound that you could classify as a mor-

tal wound. It was more of the multiplicity of wounds than any particular one. She had, as well as I remember, a cut over her eyebrow and possibly down to the skull, but we were unable to find any fractured bones; and other than these two, it was mostly lacerations and skins and bruises over the body. Q. What effect would you say that the number of bruises or wounds on her body would have on her? A. In a strong individual I would say from the examination that I made that I would not think that these wounds were necessarily fatal, but nothing else appearing and finding the patient dead, it would then possibly be due to the wounds that had been inflicted, nothing else to account for the death—she was below the average size; she looked to be a rather frail, delicate woman. Q. Doctor, these wounds you describe on her body—state how would you think they were caused—what kind of an instrument? A. They were not caused by any sharp instrument, but they were caused by some blunt instrument. As I remember it, from her knees on down all the way had a number of bruises and lacerations, and what we call abrasions, which is nothing more than skins. I think there were about something like twelve on her face and twelve on her chest; I don't know about under her arms, but they extended out on both sides to some extent."

Dr. W. L. Kirkpatrick, an admitted expert, corroborated in substance the evidence of Dr. Stringfield, and said: "Two of the bruises were what we call lacerations or torn wounds with rough edges extending down to the skull. They were on the forehead above the eyes." Without objection he stated: "In my opinion, she died from the effect of the bruises."

The defendant testified, in part: "We kept waiting until it would slacken a bit; it commenced getting late and I wanted to get back home. I was expecting the two little boys at home. So we struck out, and when we started she could not travel very good, and I had her by the arm, and we kept on going towards home; we got along pretty slow. Out along there is a little trail way that turns off down to what they call the Bill Avery Messer house; there is where the trail turns off to the left, and she kind of staggered against me and slid off, and I went off with her; and I picked her up and tried to get back on the trail. It had rained and was so dark you could hardly tell how to travel except by feeling of the road, but I knowed it well. We went up the pathway to the old house, through a field. When she went over the bank I straightened her up and went right on and it seemed she would keep falling to her knees every once in a while. I kept holding her by the arm the best I could. We went on down and crossed down by the branch, just before we got out to where she finally fell. I don't remember just how many times she fell, but I remember those times. Just

before we got out in the road it was washed out right smart. It was a little bit steep, so I thought we would go around and get in the main road, and as we got down a little bit she made a blunder and fell loose from me and fell. I didn't see her hit nothing, but I picked her up as quick as I could and straightened her out, and she never did stand up any more or speak; that is the place where the rock is; it is what I call hard flint. It lies a little angular as the road goes this way. It is what you might say in the fork of the road. When I discovered she could not stand I was excited. I saw she was hurt, and I kept asking her, but she never did speak. I picked her up the best I could in the dark, and I could not carry her in my arms, and I thought maybe I could carry her on my shoulder. I shouldered her, and when I went to make one step on the bank I slipped and fell, and her on my shoulder. It was still raining, and was so dark you could not see your hand before you. I picked her up and fell with her, and just as quick as I could get her up I listened to see if she was breathing. She was not making any fuss. You could tell by holding her close. Then I picked her up again, and I shouldered her and slipped. I don't remember when I fell the last time, but I picked her up twice. After that I don't hardly think I could shoulder her any more. I just could not do it. I picked her up and moved her out of the main gully; the water was running along there. I hollered and called all I could. I was excited and in so much trouble that I could not make any statement of how long I did holler or stay there. I know that after I did come to myself and seen that she was plum gone, I just don't know how long I did stay there. . . . I had tried to carry her and couldn't do that, then I just decided I would take the mare and sled and get her to the house. The lamp went out and I felt around and got the mare and hooked her to the sled. I had an open lamp—no globe on it. I took the sled back close by where my wife's body lay. Didn't go plum down to where she was. It was a little steep. I laid her kind of angled on the sled. I don't know how many times I went back to see if she was getting off any. When I got home I laid her on the bed, staying there the balance of the night." Defendant testified he was not mad—had no malice. On cross-examination he said: "For the last two or three years I have been working and trying to make a living. I have not been making liquor. That old still up at my barn was an old thing some one left there to get some pieces out of. I don't know who brought it there. If there was any malt at my house I don't know it. My son, Albert, and I have not been making liquor for the last two or three years. I don't know point blank why Albert Messer is not here today. They have a little old revenue case against him and his wife."

There was some evidence that defendant had a scratch or scar on his face. He claimed this was caused by a limb or twig striking him in the face. There was other evidence corroborating defendant.

The above is a partial narrative of the witnesses as to the tragedy. There was no eye-witness to the killing. Sunday night, however, about ten or eleven o'clock some of the neighbors heard hollering, and the voice sounded like a woman or child screaming. This was in the direction of the point at which the defendant said his wife fell down and killed herself. There were signs of a struggle all about the place; some of the hair of the deceased was picked up at two or three places and a string used as a garter was also found. Near the place of the struggle was also found a "tizwood" bush which looked like limbs had been broken off it; tracks led up to this. It was a fair inference from the testimony of the State that the defendant became exasperated with his drunken wife on the way home that night, and using a limb from the "tizwood" bush, probably thrashed her at the time Jenkins heard a woman's voice screaming. They were both drinking. She was evidently dragged along the ground for some distance, which accounted to some extent for the abraded condition of her legs from the knees down and of her breast. The jury seems to have adopted the theory that the defendant had beaten his wife that night to such an extent as to cause her death. The physicians do not claim that any single wound caused her death, but the abundance of them, coupled with her physical condition.

Defendant's exceptions and assignments of error 1 and 2 were to questions put by the State's counsel to expert witness, Dr. Stringfield, as to the effect of such a number of bruises or wounds on her body, and second, as to what in his opinion was the kind of instrument used which made the wounds. This evidence was competent. *S. v. Harris*, 63 N. C., 1; *S. v. Stewart*, 156 N. C., 636; *Shaw v. Handle Co.*, 188 N. C., 232.

Defendant's exceptions and assignments of error 3, 4 and 5 were to statement by the court of the contentions of the State arising upon the evidence; they cannot in the condition of the record be assignable as error in this Court, particularly after the jury had convicted the defendant only of manslaughter. Further, no exceptions to the contentions were taken at the time. *S. v. Sinodis*, 189 N. C., p. 571.

The sixth exception and assignment of error cannot be sustained. It is a correct charge on the law of murder in the second degree, but whether it is or not is not material on this appeal, because the defendant was convicted only of manslaughter.

The seventh exception and assignment of error was to the portion of his Honor's charge applying the doctrine of manslaughter to some of

the particular contentions of the State in the case. The charge excepted to in this particular is abstractly correct. It should be interpreted, however, in connection with the other portion of the court's charge, which is as follows: "The defendant further says that he is not guilty of the crime of manslaughter, and that you should so find. He argues that the State has failed to prove that the deceased came to her death from the result of a blunt instrument in his hands, and there is no presumption of malice or the unlawful act on his part resulting in her death; that there is no evidence of a combat; that the deceased never struck him and that the scar or scratch on his face was caused by a limb or twig striking him in the face. Gentlemen of the jury, the facts are for you. It becomes the duty of the court to instruct you of the principle of law applicable to the case. You take the law from the court and the court alone."

The eighth exception and assignment of error was to the alleged failure of his Honor to recapitulate the evidence. There is, however, in the record no request on the part of either the State or the defendant that the evidence should be recapitulated. In the absence of such request, there would be no error in a charge of this kind. *S. v. Ussery,* 118 N. C., 1177; *S. v. Kinsauls,* 126 N. C., 1095; *S. v. Shemwell,* 180 N. C., 718.

The defendant and his wife had been married over a third of a century; nine children had been born to the union. Along the lonely mountain trail he and she were on the way to their humble mountain cabin, where they had lived long years. Both had been drinking. It was raining torrents, the night was dark, the creek was roaring; sounds were heard above the rain, the storm and the roaring creek; they sounded like a woman or child screaming. There were signs of a struggle along the mountain trail. When the morning sun arose and the news scattered over the mountains and the neighbors came, they found her dead in her humble home. The little frail, delicate woman had twelve or fourteen bruises and lacerations on her face, on her chest and arms there were twenty-five or thirty. From the crown of her head to the soles of her feet she was covered with mud, wounds and bruises. Her hair was in a tangled web, some gone—two of the wounds on the forehead above the eyes were torn with rough edges extending down to the skull. Defendant said she fell on a rock in the road—where there is a flint rock—and killed herself, and died in about five minutes; that she fell four or five times. He tried to carry her home. He went home and hitched his horse to a sled and brought her to their home. The little cabin on Cove Creek Mountain is closed—the mother dead, the children scattered, the father in the toils of the law. A jury of his countrymen has convicted him of manslaughter. At the trial, his son,

Albert, could not be with him to help bear the burden; he was a fugitive from justice—a liquor case against him. The old still is up in the barn near the cabin, a silent witness to a broken home, and scattered family.

We throw a mantle of charity around her. She performed her duty and went down into the valley of the shadow of death and bore him nine children.

"As the husband is, the wife is; thou art mated with a clown,
And the grossness of his nature will have weight to drag thee down."

The court below tried the case with care. We can find in law
No error.

WILLIAM WHITMAN, INC., v. W. H. YORK AND J. P. YORK.

(Filed 9 June, 1926.)

1. Bills and Notes—Negotiable Instruments—Infirmities—Endorsement—Holder in Due Course—Burden of Proof.

Where in an action upon promissory notes appearing in form to be negotiable, it is admitted by the defendants that the notes were signed and delivered to the payee, sets up certain equities against him, and denies that the plaintiff by endorsement is the holder in due course, and the alleged infirmities of the instrument are admitted by the plaintiff, the burden is upon the plaintiff to show that he is a holder in due course, that the endorsement to him by the payee was genuine, and before maturity, in order to avoid liability as to the existing equities between the original parties. C. S., 3033, 3036, 3039, 3040.

2. Same—Admissions.

Where there is an undated endorsement of an instrument negotiable in form of the name of the payee, and the maker in his answer in the action on the note denies that the plaintiff, the endorsee, was a holder in due course, and sets up certain equities, the defendant's admission that the plaintiff was the equitable holder of the instrument, cannot be held as an admission that the plaintiff was a holder in due course, or relieve the plaintiff of the burden of showing the genuineness of the endorsement, or that it was transferred before maturity.

3. Same—Admissions—Evidence.

While the burden is upon the defendant, the maker of a negotiable note, to show infirmities in a negotiable instrument in an action by the plaintiff claiming as a holder in due course, the plaintiff's admission of these infirmities renders it unnecessary for defendant to offer evidence thereof. C. S., 2976.

4. Same—Instructions.

Where the plaintiff in an action to recover of the maker of a note, negotiable in form, claims to be a holder in due course by the endorse-

ment of the payee, which is denied and evidence to the contrary is introduced by the defendant, but no evidence is introduced by the plaintiff except an undated endorsement in the plaintiff's name and the date of the maturity of the note has passed, an instruction is proper that the jury, upon the evidence, if believed, answer the issue as to the infirmity of the instrument, for defendant. C. S., 3010.

5. Bills and Notes — Negotiable Instruments — Holder — Endorser — Equities.

A holder of a negotiable instrument without endorsement takes subject to existing equities between prior parties thereon.

6. Same—Actions—Judgments—Appeal and Error.

Where by endorsement a holder takes subject to existing equities between prior parties, but not as a holder in due course, he has his right of action against his endorser, and a judgment requiring him to cancel and file the instrument sued on, with the clerk, is erroneous.

APPEAL by plaintiff from *Wright, Emergency Judge,* at January Special Term, 1926, of BURKE. No error.

Action upon two notes, executed by defendants, and payable to the order of Paul Rubber Company. Plaintiff alleged that it was the holder in due course of said notes. This allegation was denied by defendants, who set up in their answer, in defense of plaintiff's action against them on the notes, certain equities and defenses as against the payee; they contended that these equities and defenses were good as against plaintiff, for that plaintiff was not holder of the notes, in due course.

Before the introduction of evidence, plaintiff tendered two issues; the court, being of opinion that other issues arose upon the pleadings, refused to submit these two issues only. To such refusal, plaintiff excepted. The court then announced that the following issues would be submitted to the jury:

1. Were the two notes for $5,000 each sued on herein executed in payment of the purchase price of stock in the Paul Rubber Company, as alleged in the answer? Answer: .....

2. If so, has the Paul Rubber Company, or any one acting for and in its behalf delivered or tendered to the defendants the stock in said company for the purchase price of which the said notes were given? Answer: .....

3. Was the defendant, J. P. York, at the time of the execution of said notes an infant, within the age of 21? Answer: .....

4. Were the notes sued on herein given under the terms of a conditional contract for the purchase of said stock on condition that the said contract and the notes, given in pursuance thereof should not constitute a valid, binding contract, but the notes should be held until the defendant had investigated the financial condition of the Paul Rubber Com-

pany and until W. H. York had been appointed guardian of his son, J. P. York, and had been authorized to purchase said stock and had so notified said company or its salesmen, alleged in the answer? Answer: .....

5. If so, did the Paul Rubber Company, in violation of the terms of said contract, fraudulently put said notes in circulation as alleged in the answer? Answer: .....

6. Did the Paul Rubber Company, in entering into said contract for the sale of the stock, fail to comply with the provisions and conditions of section 6367 of the Consolidated Statutes of North Carolina, as amended by chapter 180, Acts of 1923, as alleged in the answer? Answer: .....

7. Was the execution of the two notes sued on herein induced and procured by the false and fraudulent representations and assurances of the Paul Rubber Company and its agents, as alleged in the answer? Answer: .....

8. Is the plaintiff, Wm. Whitman Company, Inc., a holder in due course of the two notes sued on herein as alleged in the complaint? Answer: .....

9. What sum, if anything, is plaintiff entitled to recover? Answer: .....

To the submission of these issues plaintiff excepted. Upon the announcement by the court that the foregoing would be submitted as the issues, defendants admitted the execution of the notes by them, and admitted also that plaintiff is now the holder of said notes, denying, however, that plaintiff is the holder in due course. Defendants further admitted that plaintiff was the equitable owner of said notes. Upon these admissions the court held that the burden was upon defendants upon the first seven issues, and upon the plaintiff upon the last two issues. It thereupon held that defendants should first offer evidence. To this holding plaintiff excepted.

Upon the announcement of the foregoing ruling, plaintiff agreed, in open court, before the introduction of any evidence, that the first issue should be answered "Yes," the second "No," and the third, fourth, fifth, sixth, and seventh, each, "Yes." Upon this agreement the court held that the burden being upon plaintiff to satisfy the jury, by the greater weight of the evidence, first, that plaintiff is the holder in due course of said notes; and second, that plaintiff is entitled to recover of defendants the amount as alleged in the complaint, plaintiff was entitled to the opening and conclusion. Plaintiff thereupon offered evidence, which was submitted to the jury. No evidence was offered by defendants.

The jury, under the instructions of the court, having answered the eighth issue, "No," and the ninth issue, "Nothing," judgment was rendered upon the verdict that plaintiff is not entitled to recover of defendants or either of them upon the notes set out in the complaint. It was further ordered that plaintiff file said notes with the clerk of the court, marked "canceled."

From said judgment plaintiff appealed. Assignments of error, relied upon by plaintiff on its appeal in this Court, are discussed in the opinion below.

Avery & Patton and Avery & Fairfield for plaintiff.

R. L. Huffman, C. E. Cowan, S. J. Erwin and S. J. Erwin, Jr., for defendants.

CONNOR, J. Manifestly, plaintiff's assignments of error, based upon exceptions, with respect to the issues and to the holding as to the burden of proof, upon the first seven issues, cannot be sustained. Plaintiff's consent that these issues should be answered by the jury, in accordance with the contentions of defendants, make it unnecessary to consider or to discuss the exceptions upon which these assignments of error are based.

The burden upon the first seven issues, involving exclusively matters alleged in the answer, upon which defendants contend that the notes sued on are invalid, was upon defendants, who admitted the execution of the notes by them; the consent of plaintiff that these issues should be so answered as to sustain these allegations precluded the necessity of the introduction of evidence by defendants to sustain their contention that the title of the Paul Rubber Company, payee, to the notes, was defective, within the meaning of C. S., 3036, and C. S., 3040. The truth of this contention was, in effect, admitted by plaintiff, when it agreed that the issues should be answered as contended by defendants. *Fuller v. Smith,* 58 N. C., 192; *Shingle Mills v. Lumber Co.,* 171 N. C., 410. The title of the Paul Rubber Company to the notes was, upon the facts found by the jury, with the consent of plaintiff, defective. *Proctor v. Fertilizer Co.,* 189 N. C., 243; *Phosphate Co. v. Johnson,* 188 N. C., 419; *Bank v. Felton,* 188 N. C., 384; *Moon v. Simpson,* 172 N. C., 576, and 170 N. C., 335; *Bank v. Walser,* 162 N. C., 54. Plaintiff acquired title to the notes from the Paul Rubber Company; the burden upon the eighth and ninth issues was therefore upon plaintiff to prove that it had acquired title to the notes, and held same, as a holder in due course. C. S., 3040; *Bank v. Howard,* 188 N. C., 543; *Discount Co. v. Baker,* 176 N. C., 546; *Smathers v. Hotel Co.,* 168 N. C., 69; *Mfg. Co. v. Summers,* 143 N. C., 102. If plaintiff failed to sustain this burden by evi-

dence, from which the jury could find, by its greater weight, that plaintiff was such holder in due course, the notes, although in its hands as a holder, other than a holder in due course, are subject to the same defenses as if they were nonnegotiable. C. S., 3039. The notes are, admittedly, in form negotiable instruments; notwithstanding this fact, they are subject to the same defenses in this action as they would have been in an action by the Paul Rubber Company, unless plaintiff is a holder of the notes in due course, as defined in C. S., 3033. It is but just that plaintiff, who relied upon the special protection which the law gives to the bona fide holder of a negotiable instrument, to enforce payment of these notes, admittedly procured by the fraud of the payee, should be held to strict proof of all the facts involved in its allegation that it is a holder in due course, and therefore not affected by the equities of defendants. But for the principle underlying the law of negotiable instruments, plaintiff could not recover, for it is a general principle of law that no one can transfer a better title to property than he has. The party who claims the benefit of the exception to the general principle must bring himself within all the conditions on which it depends. *Combs v. Hodges,* 62 U. S., 397, 16 L. Ed., 115.

In their answer defendants deny the allegation in the complaint that plaintiff is a holder in due course of the notes set out in the complaint; in their further defense they allege "that if said notes were delivered to plaintiff herein, or transferred by the Paul Rubber Company to the plaintiff, which is expressly denied, then defendants allege that, as they are informed and believe, the plaintiff is engaged in the business of a note broker and is not the owner of said notes, but is a mere collecting agent." On the trial, before the introduction of evidence, and while the court had under consideration its ruling as to the burden of proof upon the issues, which it had announced would be submitted to the jury, defendants admitted that "plaintiff is now the holder of said notes, denying, however, that plaintiff is the holder in due course." This admission was immediately qualified by the statement, appearing in the record, that defendants further admitted that plaintiff was "the equitable owner of said notes." Thereafter, and before any evidence was introduced, the court ruled that the burden upon the issues involving the allegations that plaintiff was a holder in due course, and was entitled to recover upon the notes, was upon plaintiff. Plaintiff, without objection, or exception to this ruling, assumed the burden, and introduced in evidence the deposition of the secretary and treasurer of plaintiff, taken in the city of Boston, Mass. This deposition, and exhibits attached thereto, including the notes sued on, and correspondence, by letters and telegrams, between plaintiff, at Boston, Mass., and the Paul Rubber Com-

pany, at Salisbury, N. C., constitute all the evidence submitted to the jury. No evidence was offered by defendants.

Each of the notes offered in evidence, executed by defendants, is a negotiable instrument, complete and regular on its face; there is evidence, from which the jury could find that both notes were received by plaintiff at Boston, Mass., through the mail, from the Paul Rubber Company, at Salisbury, N. C., before maturity; that plaintiff took both notes in good faith, and for value, without notice of any infirmity in either note or of any defect in the title by which the Paul Rubber Company, payee, held the said notes. On the back of each note, at the time it was identified by the witness and attached as an exhibit to the deposition, were written the words, "The Paul Rubber Company, by W. M. McConnell, Pres." There is no evidence tending to show by whom these words were written, or when they were written on the back of the notes. The notes are dated 12 November, 1923; they are due, according to their tenor, on 12 April, 1924. They were received by plaintiff on 18 February, 1924, and were identified and attached to the deposition on 20 November, 1925.

The court instructed the jury that there was no evidence, and no admission in the record, tending to prove that the notes were endorsed by the Paul Rubber Company, or when the words appearing on the back of the notes were written thereon. It thereupon instructed the jury that if they believed the evidence, they should answer the eighth issue, "No" and the ninth issue, "Nothing." To these instructions defendants excepted. Assignments of error based upon these exceptions are chiefly relied upon by plaintiff, on its appeal to this Court.

We find no error in either instruction. The only witness, whose testimony was offered as evidence, was the secretary and treasurer of plaintiff. He testified in his deposition taken in Boston, Mass., that all the transactions between plaintiff and the Paul Rubber Company were by correspondence; that he did not know W. M. McConnell, whose name appears on the back of each note, and upon letters included in the correspondence, as president of the Paul Rubber Company; that the notes sued on were received by plaintiff, through the mail, on 18 February, 1924. This witness testified that the notes were "assigned" to plaintiff as collateral security; for obvious reasons, he does not testify that they were indorsed by the Paul Rubber Company, nor does he testify that the words written on the notes, at the time he identified them, appeared thereon at the time the notes were received by plaintiff. It is well settled by the decisions of this Court, as well as of other courts, and by approved text-writers, that words, written on the back of a negotiable instrument, purporting to be an indorsement by which the instrument was negotiated, do not prove themselves. The mere introduction of a

note, payable to order, with words written on the back thereof, purporting to be an indorsement by the payee does not prove or tend to prove their genuineness. C. S., 3010. *Critcher v. Ballard,* 180 N. C., 111; *Security Co. v. Pharmacy,* 174 N. C., 655; *Midgette v. Basnight,* 173 N. C., 18; *Worth Co. v. Feed Co.,* 172 N. C., 335; *Moon v. Simpson,* 170 N. C., 335; *Bank v. Drug Co.,* 152 N. C., 142; *Mayers v. McRimmon,* 140 N. C., 640; *Tyson v. Joyner,* 139 N. C., 69.

Counsel for plaintiff, on the argument, and in their brief, contend very earnestly, and quite insistently, that defendants' admission that plaintiff is a "holder" of the notes, is by reason of the definition of that word in C. S., 2976, an admission that plaintiff is an indorsee of the notes, and that this admission implies necessarily that plaintiff acquired title to the note by indorsement of the Paul Rubber Company. If this contention is well founded, the burden would still be upon plaintiff to prove that the notes were negotiated by indorsement prior to maturity. The presumption that every holder is a holder in due course, does not apply, when as in this case, it is alleged and shown that the negotiable instrument was indorsed by one whose title was defective. In such case the burden is on the plaintiff, who alleges that he is a holder in due course, to prove that he acquired the title from one whose title is admittedly or shown to be defective as such holder. C. S., 3040. He can sustain this burden only by offering evidence tending to prove every essential fact to constitute him a holder in due course.

A negotiable instrument may be transferred or assigned without indorsement; a transferee or assignee, who holds the negotiable instrument without indorsement, holds subject to equities between prior parties to the instrument. *Tyson v. Joyner,* 139 N. C., 69; *Bresee v. Crumpton,* 121 N. C., 122; *Jenkins v. Wilkerson,* 113 N. C., 535; *Miller v. Tharel,* 75 N. C., 148.

It is said in C. S., 2976, that in chapter 58, of the Consolidated Statutes of 1919, entitled, "Negotiable Instruments," unless the context otherwise requires, the word " 'Holder' means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof." It is clear that the word as used in many sections of this chapter does not mean a payee or an indorsee, sections 3006, 3030, 3034, 3038, 3039, and 3040. The word has been used in opinions of this Court, where it is clear that it was not used as meaning either a payee or an indorsee. *Critcher v. Ballard,* 180 N. C., 115; *Bank v. McEachern,* 163 N. C., 336; *Bresee v. Crumpton,* 121 N. C., 123; *Bank v. Drug Co.,* 152 N. C., 143; *Moon v. Simpson,* 170 N. C., 336; *Steinhilper v. Basnight,* 153 N. C., 294.

Upon the facts appearing in the record, it is manifest that counsel for defendants did not intend by the admission that plaintiff was a

holder of the notes, at the time of the trial, but not a holder in due course, to admit that the notes sued on by plaintiff had been negotiated by indorsement of the payee prior to maturity. The admission was qualified, immediately, before evidence was introduced by plaintiff, by the statement that defendants admitted that plaintiff was the equitable owner of the notes. Defendants had alleged in their answer that the notes had not been transferred to plaintiff, but that plaintiff held them only for collection. The equitable owner of an unindorsed negotiable instrument has been referred to as the *holder* of the instrument by writers of opinions for this Court: *Hoke, J.*, in *Critcher v. Ballard, supra; Allen, J.*, in *Bank v. McEachern, supra; Clark, J.*, in *Bresee v. Crumpton, supra.* It is clear that the court so understood the admission. It does not appear that counsel for plaintiff were misled, or that plaintiff was prejudiced by the admission as intended by counsel for defendants, and as construed by the Court. We cannot concur with the contention of counsel for plaintiff that the admission was some evidence of the genuineness of the indorsement, and that therefore the instruction of the court was erroneous. We find no error in the instructions.

It is ordered in the judgment that plaintiff cancel the notes, and file same in the office of the clerk. While plaintiff is not entitled to recover of defendants upon these notes, it is not precluded from maintaining an action on the notes as against the Paul Rubber Company, upon its contention, which it failed to establish in this case, that the Paul Rubber Company indorsed the notes to it. Neither the judgment nor the order can affect its right to hold the Paul Rubber Company liable as indorser, if in an action against said company it can show that said company indorsed the notes, and thereby negotiated them to it.

The judgment herein is affirmed. There is

No error.

JENNIE SLOAN SCALES ET AL. v. JOHN A. BARRINGER.

(Filed 9 June, 1926.)

1. Wills—Interpretation—Intent.

A will is interpreted in accordance with the intent of the testator as gathered from the language used in the entire instrument, which may be aided in proper instance from the circumstances surrounding him at the time the will was executed.

2. Wills—Interpretation—Estates—Vested and Contingent Interests.

Where there is uncertainty as to the time or person in the creation of a devise or bequest, the interest in the property is contingent and not vested.

3. Same—Wills—Descent and Distribution.

A devise of a certain described lot of land to the testator's daughter for life, giving her the power of sale upon ascertainment of the value of her life estate with equal division of the proceeds among the testator's children or their representatives, and if she should not exercise the power, the land to be sold after her death for a like division: *Held*, the estate in remainder does not vest until either the power of sale under the will has been exercised by the first taker, or at her death; and the children of the testator or their "representatives" as the case may be, who have died before the happening of either event, have no interest descendible to their heirs at law or subject to their devise.

APPEAL by defendant from *Bryson, J.*, at March Term, 1926, of GUILFORD.

Controversy without action under C. S., 626, *et seq.*, upon the following facts:

1. In 1902, and for many years prior thereto, Robert N. Sloan was the owner in fee of a tract of land in Guilford County, North Carolina, described as follows: "Situated on West Market Street in the city of Greensboro, North Carolina, known as the Home Place, where I now live, bounded on the south by West Market Street, on the west by Eugene Street, on the north by West Gaston Street, and on the east by the West Market M. E. Church property." This was the home place of Robert M. Sloan, and he resided there with his family for more than thirty years prior to his death.

2. The family of Robert M. Sloan were the following:

(a) His wife, Mrs. Sarah Jane Paisley Sloan, who died 10 December, 1884.

(b) A son, John Sloan, who died 9 November, 1885, leaving him surviving two children who are still living, to wit, the plaintiffs, Charles W. Sloan and Mrs. Sarah Paisley Sloan Wyatt.

(c) A daughter, Fannie Sloan, who intermarried with Dr. John E. Logan on the ..... day of ....., 18 ..... The said Dr. John E. Logan died 31 March, 1912, and the said Mrs. Fannie Sloan Logan died 11 January, 1926. There were no children born of this marriage. Dr. and Mrs. Logan always made their home with the testator, her father, until his death, 27 July, 1905. The children, other than Mrs. Logan, had, prior to 10 March, 1902, married and moved away.

(d) A daughter, Jennie Sloan, who intermarried with Dr. Jefferson Scales. Dr. Jefferson Scales died 14 April, 1919. There were no children born of this marriage. The said Mrs. Jennie Sloan Scales is still living.

(e) A daughter, Julia Paisley Sloan, who intermarried with Cornelius Mebane, who died 28 January, 1908. There are three children surviving of this marriage, and the said Mrs. Julia Paisley Sloan Mebane is still living.

(f) A daughter, Bertha Sloan, who intermarried with Clark Porter. The said Clark Porter died 5 April, 1902, and the said Mrs. Bertha Sloan Porter died 4 September, 1903. There were born of this marriage four children, all of whom are living: Clark Porter; Ruth Porter, who intermarried with Julius Hugenot Adams; Waldo Porter, and F. Logan Porter.

(g) A daughter, Mattie Sloan, who intermarried with the defendant, John A. Barringer. The said Mrs. Mattie Sloan Barringer died 11 February, 1915. There was only one child born of said marriage, a daughter, Fannie Sloan Barringer, who intermarried with John Waldrop, and who died 29 September, 1918. There was no child born of the marriage of said Fannie Sloan Barringer with John Waldrop, and she died intestate without ever having had issue or ever having had any brother or sister. The said John A. Barringer, father of said Mrs. Fannie Sloan Barringer Waldrop, survived her and is the defendant in this cause, and has not remarried.

(h) A daughter, Ida Sloan, who intermarried with Neill Ellington, who died 30 January, 1921. There is one surviving child of this marriage, and the said Mrs. Ida Sloan Ellington is still living.

3. The said Robert M. Sloan died 27 July, 1905, leaving a last will and testament, dated 10 March, 1902, which was duly admitted to probate 28 August, 1905, and which has since been recorded in the office of the clerk of the Superior Court for Guilford County, North Carolina, and said last will and testament is in words and figures as follows, to wit:

First. I will and devise to my daughter, Mrs. Fannie Logan, wife of Dr. John E. Logan, for the term of her natural life, all my real estate situated on West Market Street in the city of Greensboro, N. C., known as the home place, where I now live, bounded on the south by West Market Street, on the west by Eugene Street, on the north by West Gaston Street, and on the east by the West Market M. E. Church property. And my will and desire is that she pay the taxes and keep the property in reasonable repair, but it is left to her choice whether she will continue to keep house and live on the property, or sell the same by agreement, or otherwise, with the other heirs, as to the value of her life estate, and divide it between herself and the other brothers and sisters or their representatives before her death. If this be not done by her during her life, at her death my will is, that it then be divided equally in fee simple between all my children or their representatives, share and share alike without discrimination.

Second. I will and bequeath to my daughter, Mrs. Fannie Logan, wife of Dr. John E. Logan, all my household and kitchen furniture, including my library, pictures, silverware, watch and ornaments, for her natural life, and my will and desire is, that everything be kept sub-

stantially as it is at present, so long as my daughter, Mrs. Fannie Logan, lives and keeps house at the old homestead; and at her death my will is, that all the property mentioned in this item (second) be divided equally among all my children or their representatives, share and share alike without discrimination.

Third. I will and bequeath to my daughter, Mrs. Fannie Logan, wife of Dr. John E. Logan, my ten shares of stock in the Guilford Lumber Company, absolutely in fee simple.

Fourth. I will, devise and bequeath all my other property of every kind and description, including bank stock, cash on hand, also insurance money in the Southern Express Company, after paying my just debts and funeral expenses, to my children and the representatives of such as are, or may be dead, in fee simple and absolutely, share and share alike, including Mrs. Fannie Logan, and not requiring her to account for the specific devises and bequests herein made to her.

Fifth. I hereby designate, constitute and appoint my daughter, Mrs. Fannie Logan, my lawful and sole executrix, without bond, to execute and carry into effect this my last will and testament, according to the true intent and meaning of the same, hereby revoking and declaring utterly void all other wills and testaments by me heretofore made.

4. During the lifetime of Mrs. Fannie Sloan Logan, there was no sale or other disposition of the real property described in paragraph 1 hereof, and referred to in article first of said will of Robert M. Sloan, and the said Mrs. Fannie Sloan Logan continued to pay the taxes upon and to remain in possession of and to keep house and live on said property until her death on 11 January, 1926, and she died in the dwelling upon said real property, which she had occupied as a residence until her death, and her husband, Dr. John F. Logan, had also made his home there until he died.

5. The said Mrs. Mattie Sloan Barringer left a last will and testament, which was duly admitted to probate 10 May, 1915, and which has since been recorded in the office of the clerk of the Superior Court for Guilford County, which said last will and testament is in words and figures as follows, to wit:

I, Mattie Sloan Barringer, being of sound mind and memory, and recognizing the uncertainty of life, do make and publish this my last will and testament:

Item One. I give, bequeath and devise to my beloved husband, John Alston Barringer, all my personal property and real estate of whatsoever kind or character, wheresoever found or situated, to him and his heirs forever.

Item Two. I do hereby appoint my said husband the executor of this my last will and testament to qualify as such, without giving bond.

In testimony whereof, I have hereunto set my hand and seal.

MATTIE SLOAN BARRINGER. (Seal.)

21 April, 1891.

Witness: MARY C. JONES.
KATIE L. VANCE.

Filed for probate 10 May, 1915.

6. The plaintiffs claim and contend under the facts herein stated and the will of Robert M. Sloan, that they are the owners of the entire fee-simple estate in the lot or tract of land described in paragraph 1 of this agreed statement of facts, owning the same in the following interests, to wit:

Charles Sloan and Sallie Sloan each a one-tenth undivided interest therein; Mrs. Jennie Sloan Scales a one-fifth undivided interest therein; Mrs. Julia Paisley Sloan Mebane a one-fifth undivided interest therein; Clark Porter, Mrs. Ruth Porter Adams, Waldo Porter, and F. Logan Porter each an undivided one-twentieth interest therein; Mrs. Ida Sloan Ellington a one-fifth undivided interest therein.

7. The defendant, John A. Barringer, claims and contends that under the facts herein stated and under the wills of said Robert M. Sloan and said Mrs. Mattie Sloan Barringer, he is the owner of an undivided one-sixth interest in the lot or real property described in paragraph 1 of this agreed statement of facts.

Upon the foregoing facts it was adjudged that the testator devised the real estate in controversy to the plaintiffs as his blood representatives in the proportion alleged by them and that they alone are entitled to take under the will. The defendant excepted and appealed.

Brooks, Parker & Smith for the plaintiffs.
R. C. Strudwick for defendant.

ADAMS, J. The death of the testator, Robert M. Sloan, occurred on 27 July, 1905. One of his daughters, Mattie Sloan Barringer, died 11 February, 1915, leaving surviving her Fannie Sloan Waldrop, her only child, whose death took place 29 September, 1918. Mrs. Fannie Logan died 11 January, 1926. The defendant contends that under the first item of Robert M. Sloan's will the devisees acquired a vested estate in remainder, the defendant's wife taking at the testator's death an undivided one-sixth interest in the real property; also that by virtue of her last will he succeeded to her title as sole devisee, and that he would have inherited the same interest from his daughter even if his wife had made

no will. On the other hand the plaintiffs say that the interest of Mrs. Barringer was contingent; that the contingency upon the happening of which her interest was to become vested did not occur during her lifetime; and that she had no estate in the devised property which could be inherited by her surviving daughter or given to her husband by her last will and testament. What interest, then, if any, did she acquire under the first item of her father's will?

In the construction of a will the cardinal purpose is to ascertain and give effect to the intention of the testator as expressed in the words he has used, and to ascertain such intention all the provisions may be examined in the light of the circumstances, including the state of the testator's family at the time the will was made. *Gibbons v. Dunn,* 18 N. C., 446; *Witty v. Witty,* 184 N. C., 375; *McIver v. McKinney, ibid.,* 393; *Snow v. Boylston,* 185 N. C., 321; *In re Wolfe, ibid.,* 563; *Pratt v. Mills,* 186 N. C., 396; *McCullen v. Daughtry,* 190 N. C., 215. In the present case the testator had a specific purpose in mind; he evidently intended that both devises and legacies should be given only to his children or their representatives. In the first item he devised the "home place" to Mrs. Logan for the term of her natural life and "left to her choice" an election between continuing "to keep house and live on the property" and "selling the same by agreement with the other heirs as to the value of the life estate" and dividing the proceeds "between herself and the other brothers and sisters or their representatives before her death." If this was not done during her life, at her death the property was to be "divided equally in fee simple between all his children or their representatives share and share alike without discrimination." In the second item he made a similar disposition of his household and kitchen furniture, library, pictures, silverware, and watch and ornaments; in the third, he gave Mrs. Logan ten shares of stock in the Guilford Lumber Company; and in the fourth he devised and bequeathed all his other property to his children and the representatives of such as were or might be dead. Every devise, every bequest is purposely and cautiously restricted to those of his own blood. In these circumstances what is the legal significance of the devise appearing in the first item of his will? Mrs. Logan, it will be noted, did not see fit to sell the "home place"; so the provision in reference to "her choice" of using or disposing of the property may be considered primarily in its relation to the testator's intent, the controversy finally turning on the last paragraph of the first item: "If this be not done during her life, at her death my will is" that the property be divided as therein directed.

The difference between vested and contingent remainders is clearly defined. A remainder is vested where the estate is invariably fixed, to remain to a determinate person, after the particular estate is spent; it

is contingent where the estate in remainder is limited to take effect either to an uncertain person or upon an uncertain event. The former passes a present interest to be enjoyed in the future; by the latter no present estate is transferred. If there is uncertainty as to the person or persons who will be entitled to enjoy the remainder or if a conditional element is made a part of the description of the remainder, it is contingent. So the immediate question is whether the testator's direction as to the distribution of the proceeds to be derived from the sale by Mrs. Logan, if she should make the sale, and his direction as to the division of the property itself after her death, if she had made no sale, designated the time when the estate in interest vested or the time when it was to be enjoyed in possession. If these provisions fixed the time when the right of property accrued, not the mere right of enjoyment, Mrs. Barringer took an interest contingent upon her surviving the life tenant.

A similar question arose in *Bowen v. Hackney*, 136 N. C., 187, in which this clause was construed: "I now declare that, with the advancements already made and specifically given in this will, in my judgment, equality is made to all my children so that at the expiration of the life estate of my wife, that which is given to her for life shall be equally divided between all my children, share and share alike, the representatives of such as may have died to stand in the place of their ancestors." A daughter of the testator had predeceased the life tenant, and it was held that her estate was contingent upon her surviving the life tenant and that no interest passed by her will to her husband. Recognizing the general rule that if there is in terms a devise, and the time of enjoyment merely is postponed, the interest is a vested one, but if the time be annexed to the substance of the gift or devise as a condition precedent, it is contingent, the Court adopted the following passage from Gray on Perpetuities: "The true test in limitations of this character is that, if the conditional element is incorporated into the description of the gift to the remainderman, then the remainder is contingent, but if after the words giving a vested interest a clause is added divesting it, the remainder is vested." It was held that the clause then under consideration annexed to the gift a condition precedent which prevented its vesting in any child who did not survive the life tenant.

The last clause in the first item of Robert M. Sloan's will bears a striking analogy to the clause which was construed in *Bowen v. Hackney*, and the principle there announced applies with equal force to both. Robert M. Sloan no doubt had in mind, as *Mr. Justice Walker* suggested in reference to Willis N. Hackney, the possibility that some of his children might die during the life of the first taker; indeed, he knew when the will was written that one of his sons had died leaving surviving children; and this contingency he met by providing for the

"representatives" (not the general heirs) of such children as were or might be dead when the property was divided. It is further evident, as suggested, that the testator intended that the devise should take effect according to the state of his family at the time the division was made. The "representatives" of any deceased children were then to stand in the place of their ancestor; it is therefore immaterial, as said in *Bowen v. Hackney,* whether the remainder to each child is contingent or whether it is vested, but subject to be divested by the child's death before that of the life tenant. In either case only one result can be reached.

This interpretation is not inconsistent with the first clause of the first item. In this clause the real property was not given to the children or their representatives, and their interest was contingent upon two events: Mrs. Logan's election to sell the property, and, if the election were exercised, the time of the sale. How many of the children would then be living? How many would then be dead with or without surviving representatives? Whether the clauses be construed separately or together the conclusion is the same: Mrs. Barringer did not acquire a vested estate at the testator's death, but an interest contingent upon her surviving the life tenant who made no disposition of the property "before her death." It follows that no estate in the devised property descended to her daughter or passed to her husband under her will. In addition to the cases cited in *Bowen v. Hackney,* we may refer to the following in support of our conclusion: *Mercer v. Downs,* 191 N. C., 203; *Brown v. Guthery,* 190 N. C., 822; *Matthews v. Griffin,* 187 N. C., 599; *Pratt v. Mills,* 186 N. C., 396; *Cilley v. Geitner,* 182 N. C., 714; *Thompson v. Humphrey,* 179 N. C., 44; *Grantham v. Jinnette,* 177 N. C., 229; *Jenkins v. Lambeth,* 172 N. C., 466; *Latham v. Lumber Co.,* 139 N. C., 9.

The cases cited by the defendant were decided upon a different principle. For example, in *Williams v. Sasser,* 191 N. C., 453, the remainder was held to be vested because there were no words importing survivorship or other contingency. So in *Witty v. Witty, supra;* but there it was said that contingent and not vested remainders are created where a testator limits the remainder after a life estate to certain persons or to the representatives of those who may have died. Not less than four times Robert M. Sloan referred in his will to the representatives of his children and brought the disposition of his property clearly within the principle enunciated in *Bowen v. Hackney,* and many other cases. The judgment is

Affirmed.

JANE MOSES ET ALS. v. TOWN OF MORGANTON ET AL.

(Filed 9 June, 1926.)

Removal of Causes—Federal Court—Nuisance—Joint Tort—Severable Controversy.

Where a town commits a nuisance to the plaintiff's special damage by emptying its sewage into a stream flowing by plaintiff's residence, and a nonresident defendant also commits a like nuisance by maintaining a tannery thereon, and the nuisance of them both are aggravated by the damming of the stream by another resident defendant, the acts of the three, thus uniting, constitutes a joint tort, and the nonresident defendant is not entitled to have the cause removed from the State to the Federal Court on the ground that the cause of action against it was severable, and complete relief could be afforded against it in the Federal Court, without reference to a fraudulent joinder of the resident defendants for the purpose of defeating the jurisdiction of the Federal Court.

APPEAL by defendant, International Shoe Company, from *R. Lee Wright, Emergency Judge,* at January Term, 1926, of BURKE. Affirmed.

The plaintiffs allege that they are the owners and in possession of a tract of land of about 125 acres, lying on the waters of Hunting Creek and the Catawba River, known as the "Waits Moses Home Place"; that a natural water course runs along the southwest boundary of said tract of land known as Hunting Creek, which empties into a large natural water course on the northwestern boundary of said tract known as the Catawba River, the waters of which said streams prior to the grievances hereinafter stated were pure and wholesome; that the defendant, town of Morganton, is a municipal corporation, chartered by the General Assembly of North Carolina; that the defendant, Western Carolina Power Company, is a corporation of the State of North Carolina, having its office and principal place of business in the city of Charlotte, Mecklenburg County, said state, and that the defendant, International Shoe Company, is a corporation of the State of Missouri, having its office and principal place of business in the city of St. Louis, said state; that a number of years prior to the commencement of this action said defendant, International Shoe Company, or its predecessor, The Burke Tannery Company, installed a system of tanning hides by means of chemicals, acids and other fluids and ingredients applied to said hides in large vats having an outlet into Hunting Creek above the premises of plaintiffs, causing a discoloration and deterioration of the waters of said stream, and its pollution from a large amount of hair, blood and fleshings discharged therein by said defendant; and that said pollution of said stream has continued for three years next preceding the commencement of this action.

That a number of years prior to the commencement of this action, the said defendant town of Morganton established a system of sewers having an outlet in said Hunting Creek above the said premises of plaintiffs and within a mile and a half thereof, causing a pollution of the waters of said stream by the discharge of dangerous and obnoxious effluences and great quantities of human excrement, which said pollution has continued for three years next preceding the commencement of this action.

That by reason of the discharge of said effluences into said stream by said defendants, the waters of said stream have ever since continued to be corrupted and polluted, causing the same to emit noxious and offensive fumes and odors and to become highly discolored and of foul and unsightly appearance and of loathsome and distasteful quality, to the annoyance, inconvenience and injury of the plaintiffs, in the use and occupancy of said premises, causing said waters of said stream to become unhealthy and unfit for domestic uses, destructive to fish therein and unwholesome for cattle, horses, swine, fowls or other domestic animals, thus causing substantial and special injury and loss to the plaintiffs in their rights in the enjoyment, use and benefit of the waters of said stream in its natural purity, and in causing the air to be filled with noxious, unwholesome and offensive odors and fumes arising therefrom.

That on or about 1 January, 1925, the defendant, The Western Carolina Power Company, completed the erection of a dam or dams in the Catawba River below the premises of plaintiffs, as plaintiffs are informed and believe, and as a result of impounding the waters of said stream by said dam or dams, said waters in said stream have been dammed up and backed up into Hunting Creek and along the premises of plaintiffs, causing the waters of said creek to become checked in their flow and resulting in the deposit in and along the banks of said creek and the channel and bed thereof and upon the bottom lands of plaintiffs, and in close proximity of the dwelling-house of the plaintiffs and of a spring from which they have for long years been accustomed to procure their drinking water, residues of slime, filth and effete matter, aggravating and rendering more harmful and more unendurable the aforesaid unwholesome condition of said stream, the unlawful and wrongful acts of the three aforesaid defendants, singly and jointly, contributing to and forming a dangerous and destructive nuisance in said stream, to the great impairment of the value of the property of plaintiffs and to the destruction of the peace and safety in the use of said property by plaintiffs for human habitation.

That by reason of the separate and combined unlawful and wrongful acts of the defendants, as aforesaid, the plaintiffs have sustained special

and substantial injuries of a permanent and continuing kind in the use and occupancy of their said lands; that the plaintiff, Jane Moses, and her family have frequently become sick in consequence thereof, and in the use and occupancy of their said lands and premises the plaintiffs have been greatly inconvenienced, annoyed and injured to their great damage in the sum of ten thousand dollars ($10,000).

The defendant, International Shoe Company, in apt time filed a petition for removal to United States District Court for the Western District of North Carolina, and, among other things, alleges: "That the causes of action alleged in the complaint are not joint, but separate and severable, and the defendants are not, and are not alleged to be joint tort-feasors. Your petitioner has no connection with the tort alleged to have been committed by the town of Morganton, which is alleged to have wrongfully emptied its sewers into the waters of Hunting Creek, nor has your petitioner any interest or connection with the tort alleged to have been committed by the defendant, Western Carolina Power Company, which is alleged to have wrongfully impounded back the waters of Hunting Creek. Your petitioner further avers that neither the town of Morganton nor the Western Carolina Power Company has any connection with your petitioner, nor in the tort alleged to have been committed by your petitioner in the operation of its tannery on said stream, or in the emission or discharge of noxious substances into said stream, or the pollution of the waters thereof by your petitioner. And your petitioner therefore avers the alleged causes of action set out in the complaint are separate, distinct and severable. That the controversy between the plaintiffs and your petitioner is a controversy wholly between them and complete relief afforded as to the separate causes of action without the presence of the other defendants."

Upon hearing before the clerk of the Superior Court of Burke County judgment was rendered that the petition of the defendant, International Shoe Company, be and the same is denied.

On appeal the motion was heard before his Honor, R. Lee Wright, judge presiding, and denied, and the judgment of the clerk of the Superior Court of Burke County affirmed. Defendant, International Shoe Company, excepted, assigned error and appealed to the Supreme Court.

W. A. Self, L. E. Rudisill and Avery & Patton for plaintiffs.
Thos. S. Rollins, S. J. Ervin and S. J. Ervin, Jr., for defendant.

CLARKSON, J. The defendant, International Shoe Company, contends: "It clearly appears from the allegations of the complaint that the three defendants herein are not joint tort-feasors, but, if tort-feasors at all, that they acted independently, without concert or collusion and not

in pursuit of any common design to pollute the waters of Hunting Creek. One—the town of Morganton—in the effort to discharge its corporate powers, saw fit to discharge the contents of its sewers into the stream; the other—the Western Carolina Power Company—in the exercise of its corporate powers and duties, saw fit to erect a dam in the Catawba River, while the petitioner, the International Shoe Company, saw fit to empty its vats into the stream; but these acts were each and all separate, independent and distinct acts on the part of each of these defendants, and for the acts of one of the defendants the other defendants are in no way liable, for no community of interest exists between them, no relation of master and servant, of principal and agent, and none is alleged to exist. . . . The three alleged causes of action asserted against the three defendants are separate, distinct and independent of each other, and the controversy between the plaintiffs and the petitioner constitutes a separate, severable controversy wholly between citizens of different states, the solution of which is in no way dependent or conditioned upon the other two causes of action set up in the complaint and the cause should, therefore, have been removed."

On the other hand, plaintiffs contend: "It is apparent from the complaint that plaintiffs are not seeking to recover against defendants in three separate causes of action. It is true that they complain of the separate wrongful acts of defendants, namely, that the shoe company and its predecessor for a number of years prior to the institution of this action, had emptied its refuse matter into the stream, and was still doing so; that the Town had for a number of years emptied its sewage into the stream and was still doing so; and that the power company had lately built a dam across the stream and had backed up the foul waters upon the plaintiffs' land. But while plaintiffs complain of these separate wrongs, they do not ask that each wrong be taken as a separate cause of action nor ask for separate damages therefor. The truth is, as shown by the complaint, that the plaintiffs had endured for a number of years two distinct past wrongs committed by the shoe company and the town, because each of said wrongs, prior to the damming up of the stream, was a minor and less grievous wrong than the final great and unendurable wrong brought about and produced by a combination of the three unlawful acts of the three defendants acting in constructive, if not actual, notice of the wrongful and unlawful act of each other. And while the former acts of the town and the shoe company were invasions of the plaintiffs' rights, and might have been the subject of litigation for years past, and while the plaintiffs properly complain of them in their instant action in order that they may set up and differentiate the later wrong, which they elect as their cause of action, namely, the creation of a nuisance by the three defendants, they do not in their com-

plaint ask for nor do they desire damages for injuries prior to the time when the nuisance, caused by the combined unlawful acts of the three defendants, was effected and established. Plaintiffs assert and specify their cause of action in the following unmistakable language: 'The unlawful and wrongful acts of the three aforesaid defendants, singly and jointly, contributing to and forming a dangerous and destructive nuisance in said stream, to the great impairment of the value of the property of plaintiffs and to the destruction of the peace and safety in the use of said property by plaintiffs for human habitation.' To the same intent and purpose, namely, to the assertion of the claim for present and future damages for a permanent and continuing wrong, plaintiffs say: 'That by reason of the separate and combined unlawful and wrongful acts of the defendants, as aforesaid, the plaintiffs have sustained special and substantial injuries of a permanent and continuing kind in the use and occupancy of their said lands,' etc."

The contention of the International Shoe Company is supported by authorities in some jurisdictions, while others are to the contrary. In many cases of this kind it has been held to make parties joint tort-feasors there must be a common concert of action, design or purpose. In the instant case this may be shown from the result, sequence and consequences of the independent acts. If parties, although acting independently know, or have reasonable ground to believe, that their independent acts combining with the independent acts of others will create a result that will become a nuisance and they do so causing damage, they become as it were joint wrongdoers *ab initio*, and are liable as joint tort-feasors. Where all have knowledge of the independent acts that create the result and continue the independent acts with knowledge, this *ipso facto* creates a concert of action and makes a common design or purpose. Any other position, from the facts and circumstances of the case, would make plaintiffs practically remediless, although there is a nuisance which all jointly concurred in and contributed to, that is alleged made the plaintiffs' land valueless, and but for such joinder the injury would not have occurred.

The term "nuisance" means literally annoyance—anything which works hurt, inconvenience or damage or which essentially interferes with the enjoyment of life or property. 29 Cyc., L. & P., 1152.

The International Shoe Company, or the town of Morganton, *if riparian owners*, had a right to use Hunting Creek for any purpose which it can be beneficially applied, but in doing so they have no right to inflict material or substantial injury upon those below them. *Cook v. Mebane*, 191 N. C., 4. The same right is given the Western Carolina Power Company in building its dam—not to inflict material or substantial injury to those above it. This is well settled law.

It is a matter that can be reasonably inferred from the record that the town of Morganton and the International Shoe Company, while emptying its filth in Hunting Creek, knew, or in the use of due care ought to have known, that the Western Carolina Power Company was damming up the Catawba River and there was no outlet for the filth, and that sooner or later it would tend to create a nuisance or a result which might be reasonably anticipated. With this knowledge, it continued to empty the filth into the creek. They all knew the result and consequences of their acts and continued, after knowledge—they became joint tort-feasors.

26 R. C. L., p. 764, says: "There is a class of cases in which the defendants are jointly and severally liable, although they are several and not joint tort-feasors, as where there is no concert of action or unity of purpose, but the acts are concurrent as to place and the time and unite in setting in operation a single destructive and dangerous force which produced the injury. There is also another class of cases in which the defendants are jointly and severally liable, although they are not joint tort-feasors. *If their acts are separate and distinct as to place and time, but culminate in producing a public nuisance which injures the person or property of another, they are jointly and severally liable.*" *Bunker Hill & Sullivan Mining, etc., Co. v. Polak*, 7 Fed. Rep. (2d series), p. 583; *Hillman v. Newington*, 57 Cal., 56; *McDaniel v. City of Cherryville*, 91 Kan., 40. The decisions in the different states are carefully annotated in *Farley v. Crystal Coal & Coke Co.* (West Va.), 9 A. L. R., 933.

Cooley on Torts (3 ed.), p. 246-7, says: "In respect to negligent injuries, there is considerable difference of opinion as to what constitutes joint liability. No comprehensive general rule can be formulated which will harmonize all the authorities. The authorities are, perhaps, not agreed beyond this, but where two or more owe to another a common duty and by a common neglect of that duty such other person is injured, then there is a joint tort with joint and several liability. The weight of authority will, we think, support the more general proposition, that, where the negligence of two or more persons concur in producing a single, indivisible injury, then such persons are jointly and severally liable, although there was no common duty, common design or concert action.

The International Shoe Company says in its brief: "If we are correct in our conclusions that the defendants are not joint tort-feasors, then it is clear that the controversy between the plaintiffs and the International Shoe Company is a separable controversy from that between the plaintiffs and the other defendants herein, the decision of which is

in no way dependent upon or involved in the controversy between the other parties, and that the cause is a removable cause."

We do not think the action a separable controversy. The International Shoe Company was a joint tort-feasor and was an indispensable necessary party to the action. *Morganton v. Hutton,* 187 N. C., 756; *Bank v. Hester,* 188 N. C., 71.

In *Timber Co. v. Ins. Co.,* 190 N. C., p. 803, it is held: "If the defendant, or defendants, who seek to remove, are jointly liable, either in tort (*Ry. Co. v. Dowell,* 229 U. S., 102; *McAllister v. R. R. Co.,* 243 U. S., 302), or in contract (*R. R. v. Ide,* 114 U. S., 52; *Pirie v. Tvedt,* 115 U. S., 41; *Core v. Vinal,* 117 U. S., 347; *Sloane v. Anderson,* 117 U. S., 275), the requisite separability does not exist. . . . (p. 804) A joint tort is not separable," and cases cited.

Mr. Justice Sanford, of the Supreme Court of the U. S., in *Hay v. The May Dept. Stores Co. and Wm. McCormick,* opinion delivered 24 May, 1926, citing numerous authorities, says: "It is well settled by the decisions of this Court, that an action brought in a State court against two defendants jointly, in which the plaintiff states a case of joint liability arising out of the concurrent negligence of the defendants, does not present a separable controversy authorizing the removal of the cause to a Federal Court, even though the plaintiff might have sued the defendants separately; the allegations of the complaint being decisive as to the nature of the controversy in the absence of a showing that one of the defendants *was fraudulently joined for the purpose of preventing the removal.*"

From a careful review of the case the judgment of the court below is Affirmed.

FOREST CITY BUILDING AND LOAN ASSOCIATION v. WILLIAM J. DAVIS AND MASSACHUSETTS BONDING AND INSURANCE COMPANY.

(Filed 9 June, 1926.)

1. Principal and Surety—Surety Bonds—Defalcation of Principal—Notification—Substantial Compliance.

The stipulation as to immediate notification by the indemnified of defalcation of an employee covered by the bond to a company whose business is that of a surety, are construed in case of ambiguity in its expression more strongly against the company, and compliance by the indemnified, so as to put it upon reasonable notice, is held sufficient under the facts of this case.

2. Same—Evidence—Concealment of Defalcation—Experts—Accountants.

Where the indemnified has substantially complied with the stipulations of the bond in notifying the surety company within the time required by specifying the default within three classifications, it is competent to show by expert accountants who have made a personal investigation that certain transactions had the effect of covering up or concealing the defalcation specified in the notification to the defendant insurer.

3. Same—Suspicion as to Defalcation.

The requirement in the written bond of indemnity that the insured notify the insurer company immediately upon defalcation of the principal in the bonds, is sufficiently complied with if the notification be given within the time required after the insured had been reasonably satisfied, upon investigation, of the fact, and it is not required that immediately upon a suspicion notice should have been given.

4. Same—Instructions.

An instruction upon competent evidence that the insured had substantially complied with the requirement to immediately notify the surety company of the defalcation of the principal upon the bond, is held to be correct under the facts of this case.

5. Judgments—Interest—Principal and Surety—Appeal and Error—Inadvertence—Modification.

Where under the terms of the indemnifying bond interest is not due until three months after defalcation of the principal, a judgment which allows interest from an earlier period, and is otherwise correct, will be accordingly modified and affirmed.

APPEAL by defendant, Bonding and Insurance Company, from *Walter D. Siler, Emergency Judge,* at October Special Term, 1925, of RUTHERFORD. No error.

Action to recover of defendant, William J. Davis, a sum of money alleged to have been embezzled by him, while employed as secretary and treasurer of plaintiff, and to recover of defendant, Bonding and Insurance Company, the maximum amount which it had, by its bond, agreed to pay plaintiff to reimburse it for loss sustained by said embezzlement.

Issues submitted to the jury were answered as follows:

1. Was the bond issued by defendant, Bonding Company, to the plaintiff, Building and Loan Association, as alleged in the complaint? Answer: Yes.

2. Did the defendant, Davis, embezzle the funds of the plaintiff as alleged in the complaint? Answer: Yes.

3. If so, in what amount did the defendant, Davis, embezzle the funds of the plaintiff? Answer: $3,202.

4. Did plaintiff, upon discovery of the embezzlement of its funds by defendant, Davis, give immediate notice of the same to the Bonding Company? Answer: Yes.

5. Did plaintiff comply with the conditions of the bond with respect to furnishing the itemized statement as provided for therein? Answer: Yes.

From the judgment upon this verdict, that plaintiff recover of defendant, Davis, the sum of $3,202, with interest from 1 August, 1921, and of defendant, Bonding and Insurance Company, the sum of $2,000, the maximum amount of the bond, with interest from 1 August, 1921, defendant, Bonding and Insurance Company, appealed.

R. R. Blanton and Ryburn & Hoey for plaintiff.
J. F. Flowers for defendant, Bonding and Insurance Company.

CONNOR, J. On 3 September, 1919, defendant, William J. Davis, was in the employment of plaintiff as its secretary and treasurer. On said date defendant, Bonding and Insurance Company, executed as surety, with defendant Davis as principal, a bond, by which said company, in consideration of the payment of the premium as therein recited, agreed that, subject to the conditions of the bond, it would, within three months next after proof of loss had been furnished to it, reimburse plaintiff to an amount not exceeding $2,000, for such pecuniary loss of money, securities or other personal property as plaintiff might sustain by any embezzlement of said Davis while in the performance of the duties of his said office or position, which was committed during the life of the bond, and discovered within six months after the retirement of said Davis from the service of plaintiff. Among other conditions, which it is expressly stipulated in the bond shall be conditions precedent to a recovery thereunder, it is provided that "immediately after becoming aware of any act or omission which may be made the basis of a claim hereunder," plaintiff shall notify said Bonding Company and "within three months after such discovery file with the surety at its home office an itemized statement of claim sworn to by the employer, and shall produce, for investigation by the surety at the home office of the employer, all books, vouchers, and evidence, within the control of the employer, requested by the surety." It is admitted that this bond was continued in full force and effect by the issuance of a renewal certificate, until 1 August, 1921.

Evidence offered by plaintiff tended to show that defendant, Davis, retired from its service as secretary and treasurer on 1 August, 1921; that during the latter part of July, 1921, an auditor, employed by plaintiff, made an audit of the books and records of plaintiff; that on 14 September, 1921, as a result of said audit, which, however, was not accepted by plaintiff as full and correct, plaintiff notified defendant, by letter addressed to defendant at Boston, Mass., that it appeared that said Davis was short in his accounts, as secretary and treasurer; that,

thereafter, acting under the instructions of the general agent of defendant, residing at Charlotte, N. C., plaintiff had a competent and experienced auditor to make a thorough and complete audit of the books and records; that by reason of the nature of plaintiff's business, and the condition of its books and records, as kept by defendant, Davis, considerable time was necessarily consumed in making said audit; that during this time plaintiff was in correspondence with the general agent of defendant at Charlotte, N. C., in regard to the audit and its claim; that on 12 January, 1922, the audit having been completed and accepted by plaintiff, a statement of the shortage in the accounts of defendant Davis, as secretary and treasurer, verified by the president and secretary-treasurer of plaintiff, was mailed to the general agent of defendant at Charlotte, N. C.; said statement shows the shortage to consist of the following items:

Installments received and not accounted for	$2,664.65
Shortage in loan account	378.08
Shortage in cash account	200.92
Total	$3,243.65

On 27 January, 1922, defendant acknowledged receipt of plaintiff's letter, dated 12 January, 1922, with verified statement enclosed. In this letter plaintiff is advised by defendant as follows:

"What we require is an itemized statement setting forth the charge against the principal. What you have heretofore sent us is merely the amount of the total, and does not give details."

Further correspondence between plaintiff and defendant was had. Defendant, having failed to pay plaintiff's claim, summons in this action was issued, after the expiration of three months, and before the expiration of twelve months, as required by the terms of the bond, in order that recovery could be had upon the bond.

There was evidence that the net shortage of defendant Davis in the installment account, as charged to him by the auditor, was $2,676.65. Two checks were offered in evidence, referred to in the testimony of the witnesses as the Bradley checks, aggregating $2,732.65. Both of these checks were payable to plaintiff; both properly indorsed were deposited in bank by Davis to the credit of plaintiff. There was evidence that neither of these checks was entered by Davis on the books of plaintiff. The checks were given to Davis in payment of stock. The amount of both checks was included in the total amount of the shortage in the installment account, as charged by the auditor to Davis. Witnesses were permitted to testify, over objection of defendant, that as Davis had

credited himself with the deposit of these checks, but had not charged himself, on the books of plaintiff, with the checks, the effect of the deposit of the checks to the credit of plaintiff was to cover up or reduce the shortage then existing by the amount of the checks, and that he was, therefore, not entitled to credit in the accounting, to the amount of the deposit. Defendant's objections were properly overruled. Both witnesses were expert accountants—one a certified accountant, and the other a bank officer of long experience. It was competent for them to testify as to the effect upon the accounting of these entries. *S. v. Hightower,* 187 N. C., 300. Assignments of error based upon these exceptions cannot be sustained. The testimony was properly submitted to the jury upon the third issue. Plaintiff's contention that Davis had embezzled its funds in his hands, as its secretary and treasurer, to the amount as shown by the audit, did not necessarily involve these identical checks. This is clearly shown by the testimony of the auditor as to the method by which he arrived at the amount of the shortage. He charged Davis with the sum of all items which the records showed had gone into his hands, as secretary and treasurer of plaintiff, and credited him with the sum of all items for which he had properly accounted. The difference he charged in the audit to Davis.

The evidence pertinent to the first three issues, which involved primarily the liability of defendant, Davis, was sufficient, under the full and correct instructions of the court, to which there are no exceptions, to sustain plaintiff's contention as to these issues. Defendant's contentions with respect to the fourth and fifth issues are presented by its exceptions to the refusal of the court to allow its motion for judgment as of nonsuit, to the refusal of the court to give special instructions as requested in apt time, and to certain instructions given by the court in the charge to the jury. These contentions involve the construction of the provisions of the bond, which by express stipulation are conditions precedent to a recovery against defendant by plaintiff.

Did plaintiff comply with these conditions by giving "immediate notice" of its discovery of the embezzlement by Davis, and by furnishing to defendant an "itemized, verified statement" of its claim?

In view of the contentions of defendant, upon this record, the observation of *Douglass, J.,* in *Bank v. Fidelity Co.,* 128 N. C., 366, seem pertinent. *Judge Douglass,* with his usual facility of expression, says: "The object of an indemnifying bond is to indemnify; and if it fails to do this, either directly or indirectly, it fails to accomplish its primary purpose, and becomes worse than useless. It is worthless as an actual security and misleading as a pretended one." Defendant is authorized to do business in this State; this business consists in doing something more than collecting premiums in this State. It will be

required to give value received for its premiums. If its construction of the conditions in its bond, involved in its assignments of error upon this appeal, should be sustained by the courts, its bond was not only useless as a security, but was misleading to the many who doubtless relied upon it as a protection for their weekly savings invested in the stock of plaintiff, Building and Loan Association.

Two well-settled principles are applicable in the consideration of defendant's assignments of error:

1. "The law does not have the same solicitude for corporations engaged in giving indemnity bonds for profit as it does for the individual surety who voluntarily undertakes to answer for the obligations of another. Although calling themselves sureties, such corporations are in fact insurers, and in determining their rights and liabilities, the rules peculiar to suretyship do not apply." *Chicago Lumber Co. v. Douglass*, 89 Kan., 308, 44 L. R. A. (N. S.), 843, and cases cited. This Court has justly held that such corporations may make such reasonable regulations as are necessary for their own protection or the proper transaction of their business; but such stipulations will be most strongly construed against a forfeiture of the indemnity for which alone the bond is given, and in favor of a fair and equitable construction of the essential purpose of the contract.

2. "If, looking at all its provisions, the bond is fairly and reasonably susceptible to two constructions, one favorable to the bank, and the other favorable to the Surety Company, the former, if consistent with the objects for which the bond is given, must be adopted, and this for the reason that the instrument which the Court is invited to interpret was drawn by the attorneys, officers or agents of the Surety Company. This is a well established rule in the law of insurance." *American Surety Co. v. Pauly* (No. 1), 170 U. S., 133, 42 L. Ed., 977.

These principles have been approved and applied in many decisions of this Court, in actions involving life, fire and accident insurance policies. *Guarantee Corp. v. Electric Co.*, 179 N. C., 402; *Moore v. Accident Assurance Corporation*, 173 N. C., 532; *Lyons v. Knights of Pythias*, 172 N. C., 408; *Collins v. Casualty Co.*, 172 N. C., 543; *Penn v. Ins. Co.*, 160 N. C., 399; *Power Co. v. Casualty Co.*, 153 N. C., 275; *Bray v. Ins. Co.*, 139 N. C., 390; *Bank v. Fidelity Co.*, 128 N. C., 366. They will be applied in the construction and interpretation of bonds or contracts such as that involved in this action.

In *Fidelity and Deposit Co. v. Courtney*, 46 L. Ed., 1193, the Supreme Court of the United States approved an instruction that the requirement of a bond that the employer shall immediately give the company notice in writing of the discovery of any default or loss, ought not to receive the construction that it was intended by the parties that notice of a

default should be given instantly on the discovery of a default, but that what was meant was that notice should be given within a reasonable time, having in view all the circumstances of the case.

We find no error in the instruction of the court upon the fourth issue that the requirement in the bond in the instant case, that plaintiff "immediately after becoming aware of any act or omission which may be made the basis of a claim hereunder shall notify the surety at its home office," does not mean that as soon as plaintiff suspected or had suspicion that Davis was short in his accounts, plaintiff should notify defendant. Davis terminated his employment by plaintiff on 1 August, 1921; plaintiff notified defendant on 14 September, 1921, that it appeared that Davis was short in his accounts. The court properly submitted the fourth issue to the jury, with instructions that if they found from the evidence, and by its greater weight, that plaintiff in good faith and within a reasonable time after the discovery, notified defendant of such shortage, the notice was sufficient, and that they should answer the issue Yes; otherwise, No.

Nor do we find error in the instruction as to the fifth issue. Defendant's contention that plaintiff was required by the conditions of the bond to furnish a statement showing in detail each separate sum of money embezzled by Davis during the life of the bond, from 3 September, 1919, to 1 August, 1921, is unreasonable and cannot be sustained. The court instructed the jury that it was not necessary, under the provisions of the bond, that every specific item should appear in the statement furnished to defendant by plaintiff as proof of loss; that if the jury should find from the evidence, and by its greater weight that within three months from the date of the discovery of the facts upon which its claim was based, plaintiff furnished to defendant a verified statement sufficient to enable defendant to ascertain the nature of the different items upon which the claim was based, this was a substantial compliance with the condition of the bond, and the jury should answer the fifth issue "Yes," otherwise "No." This instruction is supported by authorities and upon the facts in this case it is sound in principle and in accord with justice. 14 R. C. L., 1337, sec. 507.

We have examined the special instructions requested by defendant, and refused by the court; assignments of error based upon exceptions to such refusal cannot be sustained. The contentions involved in these exceptions are practically the same as those hereinbefore discussed and decided against defendant.

It will be noted that the judgment is that plaintiff recover of defendant the sum of $2,000, with interest from 1 August, 1921. The sworn, itemized statement, which the jury found was a compliance with the provisions of the contract, was filed 12 January, 1922. It is evident

that under the terms of the bond, the sum of $2,000 was not due until the expiration of three months from that date; the judgment should be modified, to the end that plaintiff recover interest on the principal sum from 12 April, 1922, and not from 1 August, 1921, as the judgment, evidently due to an inadvertence, provides. As thus modified, the judgment should be affirmed. There is

No error.

IVY RIVER LAND AND TIMBER COMPANY ET AL. V. NATIONAL FIRE AND MARINE INSURANCE COMPANY OF ELIZABETH, N. J.

(Filed 9 June, 1926.)

Insurance—Service—Process—Statutes—Nonresident Defendant — Secretary of State—Special Appearance—Motions—Actions—Dismissal.

In order to a valid service of summons upon a nonresident fire insurance company for loss by fire, upon the Secretary of State, under the provisions of C. S., 6414, it is necessary that the defendant by compliance with C. S., 6415, or the other relevant sections of our statutes, C. S., 6288, 6410, 6424, 6425, 6426, 6427, has submitted itself to the jurisdiction of our courts, or become subject thereto, and where it has only been made to appear that the policy was obtained from a foreign agency for placing insurance, that the nonresident defendant had no property or agency in this State, C. S., 1137, nor had sent adjusters herein for losses at any time, and had only thus accepted other policies of insurance in one or two isolated cases, it is not sufficient evidence to sustain the service of process, and upon the defendant's special appearance and motion, the action will be dismissed.

APPEAL by plaintiffs from order of *McElroy, J.*, at April Term, 1926, of BUNCOMBE. Affirmed.

Summons in this action, issued on 21 November, 1925, by the clerk of the Superior Court of Buncombe County, was returned endorsed by the sheriff of Wake County, as follows: "Received 24 November, 1925. Served 24 November, 1925, by leaving a true copy of this summons with W. N. Everett, Secretary of State, for the State of North Carolina." The Secretary of State transmitted, by mail, the said copy to defendant, at Elizabeth, New Jersey.

Plaintiffs are corporations, created and existing under the laws of North Carolina, each having its principal office and place of business in the city of Asheville, in said State; defendant is a corporation, created and existing under the laws of New Jersey, having its principal office and place of business in city of Elizabeth, in said state.

On 7 November, 1924, defendant issued a policy of insurance, by which it insured plaintiffs against loss or damage by fire to certain

property located in Buncombe County, North Carolina; said policy was applied for, on behalf of plaintiffs, by Perry & Parker Co., Inc., New York brokers; it was executed and delivered in the State of New Jersey; the premium on said policy was paid to defendant in said state. The property insured by said policy was destroyed by fire on 19 December, 1924, and this action was begun to recover the value of said property, in accordance with the provisions of said policy.

Defendant has sent no adjusters into the State of North Carolina. It has not designated or appointed any agent, or other person within the State of North Carolina, upon whom process may be served. Defendant has never been admitted or licensed to do business in the State of North Carolina; it has no office or property of any kind in said state; nor has it any officers, directors, agents, or adjusters therein.

On 5 May, 1924, defendant issued a policy of insurance by which it insured the French Broad Flooring Company, then engaged in operating a flooring plant in Buncombe County, North Carolina, against loss or damage by fire to its property located in said county and state; said company paid and defendant received the premium on said policy, which remained in force and effect, according to its terms, for one year; at the expiration of said policy, defendant offered to renew it, but said company refused to accept such renewal.

On 31 December, 1925, defendant issued a policy of insurance by which it insured the Williams-Brownell Planing Mill Company, then engaged in operating a planing mill in Buncombe County, North Carolina, against loss or damage by fire to its property located in said county and State; said policy is now, according to its terms, in full force and effect.

The above recited facts having been made to appear to the court by affidavits, upon the hearing of defendant's motion, made upon its special appearance for that purpose, that the court strike out the return of the service of the summons in this action, and thereupon dismiss the action, and the court, upon consideration of all the affidavits, and the complaint filed in the cause, having found as a fact that defendant was not doing business in the State of North Carolina, it was ordered and adjudged that the return of the service of the summons in the action be stricken out, and that the action be dismissed for want of proper service of summons. From this order, plaintiff appealed.

Merrick, Barnard & Heazel and Mark W. Brown for plaintiffs.
Jones, Williams & Jones for defendant.

CONNOR, J. Defendant is a foreign insurance company, engaged in the fire insurance business. It has not been admitted or authorized to do

business in this State, according to the laws thereof. Service of summons or other legal process cannot, therefore, be made upon defendant, as provided in C. S., 6414 and 6415. No summons in this action has been served upon the Insurance Commissioner of this State, for the reason that plaintiffs do not contend that defendant has been admitted or authorized to do business in the State, under the provisions of C. S., chap. 106, Art. 16.

Defendant is, however, a corporation, incorporated under the laws of another state. It has no property in this State; it has no officer or agent in the State, upon whom process against it may be served. Plaintiffs contend, however, that it was doing business in this State, and, therefore, that under C. S., 1137, summons in this action against defendant may be served upon the Secretary of State by leaving a true copy thereof with him. Defendant admits that a copy of the summons, served on the Secretary of State, was mailed to it, at its office in the city of Elizabeth, New Jersey, and there received by it, but denies that it was doing business in the State of North Carolina, on the date of the issuance of the summons, or on the date of the issuance of the policy, upon which this action is founded.

The insured are citizens of North Carolina; the property insured against loss or damage by fire was located in North Carolina at the time the policy was issued, and also at the time it was destroyed by fire. The application for the policy, however, was made by a broker, engaged in business in New York, to the defendant, at its home office, in the State of New Jersey; the policy was issued, and the premium was paid in said State. The policy was not procured through any officer or agent of defendant in North Carolina or through any person in said State acting in its behalf. Defendant did not negotiate with insured, with respect to said policy through any person in this State. It has sent no adjuster or other agent into this State, since the destruction of the property insured by fire. Defendant has never expressly consented to be sued in the courts of North Carolina; there is no evidence of conduct, on its part, either before or since the issuance of the policy, from which such consent may be implied, unless it appears from the evidence submitted to the court, upon the hearing of defendant's motion, that defendant was doing business in the State within the meaning of C. S., 1137. The court found as a fact that defendant was not doing business, in the State and, therefore, held that the court had not acquired jurisdiction of defendant in this action by service of the summons upon the Secretary of State for North Carolina, and dismissed the action. In this, we find no error.

The validity of the service of summons in an action, instituted in the courts of this State against a foreign, or nonresident corporation, upon the Secretary of State, where it was contended that such corpora-

tion was doing business in this State, and that therefore the service upon the Secretary of State was valid, has been considered recently by this Court in *Lunceford v. Association,* 190 N. C., 314 and in *R. R. v. Cobb,* 190 N. C., 376. Upon the facts in each of these cases, it was held that the nonresident corporation was doing business in the State, and that the service was valid.

In the former case, it was found as a fact by the trial court, and embodied in the judgment that "defendant issues and delivers contracts of insurance to residents of this State, and collects from those insured by it in this State the annual dues and assessments agreed to be paid by the insured. An application of a resident of this State to defendant for insurance is dated at the postoffice address of the resident applicant, is also signed by the resident applicant and the applicant is recommended by a resident already insured by defendant and called a member of defendant's association. The application is signed by the member who recommended the applicant and the acceptance of the application also shows the postoffice address of such recommending member, and if and when a certificate or contract of insurance is issued and delivered to the applicant upon such application, the contract of insurance so issued and delivered makes the application therefor a part of the said contract of insurance."

In the latter case, it is said in the opinion of the Court, written by *Stacy, C. J.,* "It clearly appears from the record that the appealing defendant (*i. e.* the foreign corporation) is 'doing business in this State.'" The record discloses that a resident corporation, a party defendant to the action, was the distributor in North Carolina of the nonresident or foreign corporation, and not merely a distributor of the articles manufactured by it; and that said resident corporation, through its officer, acted for the nonresident corporation, in some, if not all, of the transactions in this State out of which the action arose. It thus appeared that the foreign corporation was doing business in this State through an agent in this State.

These two cases are clearly distinguishable from the instant case. In the instant case, the foreign corporation had no agent or other person acting in its behalf within the State of North Carolina. It would be a strained construction of the facts in this case, to hold that defendant came to North Carolina, and by transacting business here, submitted itself to the jurisdiction of the courts of this State. Defendant was expressly forbidden by the law of this State to make any contract of insurance within this State upon or concerning property in this State, or with any resident of this State. C. S., 6288. No action could be maintained upon such contract or policy for fire insurance in the courts of this State. C. S., 6424. Plaintiffs, citizens of this State, had not procured

license from the Insurance Commissioner of the State as provided in C. S., 6425, authorizing them to procure a policy of insurance from a foreign fire insurance company, not admitted or authorized to do business in this State.

The fact that defendant issued two other policies of fire insurance to residents of this State, upon property located in the State, is not determinative of the question involved in plaintiff's appeal. It does not appear that either of these policies—one issued before and the other subsequent to the issuance of the policy to plaintiffs—was issued in North Carolina, or through an agent or other person in the State. Nothing else appearing, we must conclude that these policies were issued under the same circumstances as those under which the policy was issued to plaintiffs. It cannot be held that the issuance of one or more policies of fire insurance, by a corporation, created and existing under the laws of another State, and not authorized to do business in this State, insuring citizens of this State against loss or damage by fire to property situate in this State, the contracts for such policies having been made, and the premiums having been paid in the State in which the foreign corporation has its principal office and place of business, not by or through any agent of such corporation or person authorized to act for it in this State, constitutes "doing business" in the State of North Carolina within the meaning of these words in C. S., 1137.

In determining the question whether a foreign corporation is doing business within a State, so as to be subject to its jurisdiction, and, to the end that such jurisdiction may be exercised, subject to service of process from its courts, in accordance with statutory provisions for such service, it has been generally held that the foreign corporation must have entered the State, in which process is sought to be served, in order that jurisdiction may be exercised therein for the purpose of carrying on its business in said State, and must have been within the State during the time such business was transacted. As a corporation may act only by its officers, agents or other persons authorized to act for it, or in its behalf, the presence within a state of such officers, agents or other persons, engaged in the transaction of the corporation's business therein, is generally held as determinative of the question. But no all-embracing rule as to what is "doing business" has been laid down. The question is one of fact, and must be determined largely according to the facts of each individual case, rather than by the application of fixed, definite and precise rules. In the last analysis, the question is one of due process of law under the Constitution of the United States. 14a C. J., 1372, sec. 4079. See *Alto v. Hartwood Lumber Co.* (Wash.) 237 Pac., 987.

It is the policy of this State, as shown by its statute law, to protect its citizens, who wish to insure their property, in this State against

loss or damage by fire, by making it unlawful for any insurance company to make any contract of insurance upon or concerning property in this State, unless and except such company is authorized to make such contract under the laws of the State. C. S., 6288. No action may be maintained in the courts of this State upon a contract or policy of fire insurance issued upon property in this State by any company not authorized by law to transact insurance business in this State. C. S., 6424. Provision is made by law for the admission of foreign insurance companies to do business in this State. C. S., 6410 *et seq.* Citizens of the State, who find themselves unable to procure protection for their property from the hazard of fire in companies authorized to do business in the State, may, upon complying with the provisions of C. S., 6425, be permitted to procure policies of fire insurance from companies not authorized to do business in the State. Five per cent of the premiums paid for such policies shall be deducted by the insured, and remitted to the Insurance Commissioner of the State, and paid by him to the State Treasurer. C. S., 6427. If any person licensed to procure insurance from an unauthorized foreign company fails to comply with the statute, under which he is authorized to procure such insurance, he shall be guilty of a crime. C. S., 6426.

The facts in the instant case, in which we affirm the order of the court below, upon its holding that defendant was not doing business in this State, are quite different from those upon which it was held in *Penn L. M. F. Ins. Co. v. Meyer,* 197 U. S., 407, 49 L. Ed., 801, that the plaintiff in error, a Pennsylvania corporation, was doing business in the State of New York. In both cases, it is true, the policies of fire insurance were issued in the states in which the insurance company was incorporated; the insured in both cases were residents of other states in which the actions were brought upon the policies, for loss or damage by fire to property situate in said states. In the latter case, nearly one-third of the fire risks assumed by the Pennsylvania Company were within the State of New York; in the instant case, only three policies had been issued by defendant, insuring residents of North Carolina against loss upon property situate in said State; thus showing that the Pennsylvania Company was engaged generally in the business of insuring property in New York, whereas the transactions of defendant with citizens of this State with respect to property therein were occasional and sporadic. It has been held that a single isolated transaction does not constitute a doing of business within the State; in only a few jurisdictions has it been held otherwise. 14a C. J., 1373. Applications for policies were sent through the mail by residents of New York to the company, at its home office in Philadelphia; policies, executed in Philadelphia, by the company, were delivered by mail to the person insured, in New York. In

the instant case the policies were applied for, issued and delivered in New Jersey. No adjusters have been sent by defendant into this State, where this action was instituted, whereas it is found as a fact in the case cited and relied upon by appellants that the Pennsylvania Insurance Company had sent adjusters into the State of New York, relative to claims made by residents of that State under policies issued by the company upon property situate there.

In support of this decision, the following authorities are cited and relied upon: *Minn. Com. Men's Association v. Benn*, 261 U. S., 140, 67 L. Ed., 573; *Hunter v. Mutual Reserve Life Ins. Co.*, 218 U. S., 573, 54 L. Ed., 1155; *Allgeyer v. Louisiana*, 165 U. S., 578, 41 L. Ed., 832, 14a C. J., p. 1379, sec. 4089 *et seq.*, and cases cited, 21 R. C. L., p. 1340, sec. 91 and cases cited.

Plaintiffs having elected to procure a policy of insurance on their property in this State from a foreign insurance company which had not sought admission into this State, under its laws, and which had not entered the State for the transaction of its business, and thereby subjected itself to its jurisdiction, cannot complain that the courts of this State have not acquired jurisdiction of said company by the service of the summons in this action, to enforce their claim under said policy. The order must be

Affirmed.

AMERICAN YARN AND PROCESSING COMPANY, A CORPORATION, V. EUGENE H. DEWSTOE ET AL.

(Filed 9 June, 1926.)

1. Estates—Fee Conditional—Contingent Remainders—Statutes.

An estate to the testator's wife for life, and at her death to be equally divided among four of his children by name, and if any of the children die without issue their proportional parts to the testator's lineal descendants: *Held*, the children take a fee conditional at the death of the testator, subject to be defeated upon the death of any of them during the continuance of the life estate, and upon the death of one or more of them, his or their share vests in the other surviving children of the testator. C. S., 1737.

2. Same—Deeds and Conveyances—Equity.

Where the children of the testator take by devise a defeasible title in the lands and attempt to convey the fee-simple title to a part thereof, when the contingency happens that vests a fee-simple title in them, and the remaining part of the land is sufficient, their part of the land thus taken by devise will be decreed to them from the lands not subject to their conveyance.

3. Same—Dower—Judgment—Appeal and Error—Procedure.

The widow of one acquiring a defeasible fee-simple title may have her homestead allotted therein, and where it appears on appeal to the Supreme Court that such relief has been granted to her, and no allotment thereof has been made, from which she has not appealed, the scope and extent of her dower interest may be left open for its ascertainment in a formal proceeding for that purpose.

APPEAL by plaintiff and certain defendants from *Cowper, Emergency Judge,* at March Term, 1926, of GASTON.

Martin R. Dewstoe died in February, 1912, seized of 83 acres of land in River Bend Township, Gaston County. He left surviving him his widow, Martha L. Dewstoe, who died 8 December, 1922, and four children, namely, Louise D. Henderson, Gertrude Costner, Martin E. Dewstoe, and Eugene H. Dewstoe. Mrs. Louise D. Henderson is the mother of Mrs. Jean Henderson Thistlethwaite and Miss Bain Henderson; Mrs. Gertrude Costner has never had a child born to her; Eugene H. Dewstoe is the father of Catherine Dewstoe, an infant under the age of fourteen years; and Martin E. Dewstoe died in Alabama 10 May, 1925, without issue, leaving as his widow Rose McDonald Dewstoe, who is his qualified executrix.

Martin R. Dewstoe also left a will, probated 16 July, 1912, the material clause of which follows: "I give and bequeath to my beloved wife, Martha L. Dewstoe, all my real estate situated in Gaston and Moore counties, including my dwelling-house, all my outhouses and other improvements, together with all my personal property including my cotton mill stocks, my livestock of whatever kind I may possess at my death, to have and to hold to her, the said Martha L. Dewstoe for and during the term of her natural life, and at her death the said real and personal property to be equally divided among my children, viz.: Louise D. Henderson, Gertrude Costner, Martin E. Dewstoe, and Eugene H. Dewstoe, and if any of my heirs dies without issue their proportional part of my estate shall revert to my lineal descendants."

On 13 August, 1918, Martha L. Dewstoe, widow of the testator, and Louise D. Henderson, widow, Martin E. Dewstoe and his wife, Gertrude D. Costner and her husband, and Eugene H. Dewstoe and his wife conveyed by deed with the usual covenants and warranties 15½ acres (which is a part of the 83 acres) to the American Processing Company, predecessor of the plaintiff; and on 7 November, 1923, a similar deed was executed to the plaintiff for 1⅔ acres (a part of the 83-acre tract) by the same grantors except Martha L. Dewstoe who had died.

Martin E. Dewstoe devised his property to his wife, and in the third item he provided that whatever he acquired under his father's will should descend through him to his wife.

After receiving the two deeds referred to above the plaintiff was informed that the children of Mrs. Louise D. Henderson and the child of Eugene H. Dewstoe claim that they have a contingent interest in the land thus conveyed to the plaintiff and that such interest can be determined only as the several heirs may die; and therefore it brought suit praying that it be declared the owner of an indefeasible title to the two lots conveyed to it and that the defendants and the unborn lineal descendants of Martin E. Dewstoe be forever excluded; or in lieu thereof that the share of Martin E. Dewstoe in the land devised by his father be allotted in fee to Louise D. Henderson, Gertrude D. Costner, and Eugene B. Dewstoe so as to include the land conveyed to the plaintiff and that it be decreed that their title inure to the benefit of the plaintiff by virtue of the deeds executed by the defendants. A guardian was appointed to represent the infant defendant and the unborn lineal descendants. The following verdict was returned:

1. Are the devisees of Martin R. Dewstoe, deceased, still the owners of the entire tract of land described in paragraph 4 of the complaint, subject to the terms and provisions of the will of Martin R. Dewstoe, except the parcels thereof heretofore conveyed to the plaintiff by the deeds of conveyance referred to in paragraph 7 of the complaint? Answer: Yes.

2. Are the two parcels of land conveyed to the plaintiff by the deeds of conveyance referred to in paragraph 7 of the complaint (being parts of the tract described in paragraph 4 of the complaint), at this time and at all times since the death of Martin R. Dewstoe less in value and acreage than one-fourth of the acreage and value of the tract of land described in paragraph 4 of the complaint, which was devised by the will of Martin R. Dewstoe, deceased, as alleged in the complaint? Answer: Yes.

3. Can one-fourth in value of the tract of land described in paragraph 4 of the complaint, be set aside and allotted in severalty to the defendants, Mrs. Louise D. Henderson, Mrs. Gertrude D. Costner, and Eugene H. Dewstoe, so as to embrace and include the parcels of said entire tract of land heretofore conveyed to the plaintiff by the deeds of conveyance referred to in paragraph 7 of the complaint, without prejudice to the interest of the other parties who now have, or may hereafter acquire, an interest in said tract of land under the will of Martin R. Dewstoe, deceased? Answer: Yes.

Judgment for the plaintiff and appeal as noted.

W. S. O'B. Robinson, Jr., for plaintiff.

R. B. Evins and Cansler & Cansler for Rose McDonald Dewstoe.

O. F. Mason, Geo. B. Mason and O. F. Mason, Jr., for Eugene H. Dewstoe and others.

ADAMS, J. It was adjudged by the trial court that the interest or estate of each of the four children in the devised land was subject to be defeated and terminated as to each of them by his or her death without issue then living or born within ten lunar months thereafter. This adjudication is assailed by the plaintiff and Rose McDonald Dewstoe, widow and executrix of Martin E. Dewstoe, who contend that the death of the life tenant was fixed as the time when the devise over was to become effective, and that the devise to the lineal descendants is not a limitation upon the estates taken by them on the division, but is a statement of the conditions upon which the lineal descendants of the testator were to be substituted for any child who might be dead without issue at the time the division was made.

As a general rule where a devise is made to one for life and after his death to the testator's next of kin, the next of kin who are to take are the persons who answer that description at the death of the testator and not those who answer the description at the death of the first taker. *Jenkins v. Lambeth,* 172 N. C., 466; *Goode v. Hearne,* 180 N. C., 475; *Witty v. Witty,* 184 N. C., 375; *Dupree v. Daughtridge,* 188 N. C., 193. It is otherwise, however, where it appears from the terms of the will that some intervening time is indicated. *Bank v. Murray,* 175 N. C., 62. Ordinarily a devise to the survivors of a class will take effect at the testator's death, but not if a particular estate is created and the remainder is given to those who survive the life tenant. *Mercer v. Downs.* 191 N. C., 203. Under the rule at common law a limitation contingent upon death without issue was void for remoteness because it referred to an indefinite failure of issue; and in order to give effect to the testator's intention the courts began to look for some intermediate time, such as the termination of the life estate, or some other designated period, and held that the phrase "dying without issue" was to be referred to this intermediate period. *Hilliard v. Kearney,* 45 N. C., 231. This principle was entirely changed by the act of 1827, which is now C. S., 1737: "Every contingent limitation in any deed or will, made to depend upon the dying of any person without heir or heirs of the body, or without issue or issues of the body, or without children, or offspring, or descendant or other relative, shall be held and interpreted a limitation to take effect when such person dies not having such heir, or issue, or child, or offspring or descendant, or other relative (as the case may be) living at the time of his death, or born to him within ten lunar months thereafter, unless the intention of such limitation be otherwise, and expressly and plainly declared in the face of the deed or will creating it: *Provided,* that the rule of construction contained in this section shall not extend to any deed or will made and executed before the fifteenth day of January, one thousand eight hundred and twenty-eight."

Patterson v. McCormick, 177 N. C., 448, was decided in 1919; and in an exhaustive opinion practically all the cases relating to this statute were reviewed, distinguished, and classified. In that case the testator devised his plantation to his mother during her lifetime, and then provided: "After the death of my mother I will and bequeath the plantation above mentioned to my nephews, John D. and Clem Jowers, to be equally divided between them. In case they or either of them die without issue, it is my will that the property herein bequeathed shall go to the heirs of Archibald and Gilbert Patterson and to the surviving brother John D. or Clem Jowers, as the case may be, to be equally divided between them." The life tenant died in 1877 and John D. Jowers in 1904 without surviving issue, and the Court held that as the time of dying was to be referred to the death of John D. or Clem Jowers the title to the plantation vested, upon the death of John D. absolutely in the plaintiffs and in the defendants as purchasers from Clem. Another review of the decisions would now serve no good purpose. To those cited in *Patterson v. McCormick* may be added *Love v. Love*, 179 N. C., 115; *Willis v. Trust Co.*, 183 N. C., 267; *Vinson v. Gardner*, 185 N. C., 183; *Alexander v. Fleming*, 190 N. C., 815. In some of the cases the devise was substantially the same as that now under consideration and these decisions are controlling here. On this point we find no error.

It was also adjudged that upon the death of Martin E. Dewstoe his undivided one-fourth interest vested as an indefeasible fee-simple title in the surviving brother and sisters. We think this conclusion also is correct. The manifest purpose was to provide first for the children—the grandchildren to take in succession and not as tenants in common. *James v. Hooker*, 172 N. C., 780; *Bowden v. Lynch*, 173 N. C., 203; *Robertson v. Andrews*, 175 N. C., 492. It was established by the verdict that the two lots conveyed to the plaintiff by the testator's widow and children are less in value and acreage than one-fourth the value and acreage of the 83-acre tract, and that one-fourth in value of the entire tract can be allotted in severalty to the three surviving children so as to include the lots conveyed to the plaintiff without prejudice to the other interests. Accordingly, it was decreed that the share of Martin E. Dewstoe be thus allotted, and that the cause be referred to the clerk to appoint commissioners to make such allotment by metes and bounds, excluding from consideration all improvements made on the property by the plaintiff or its predecessor, and embracing in the allotment the two lots now claimed by the plaintiff. As we understand from the briefs and the oral argument the defendants, except Rose McDonald Dewstoe, admit there is no error in the judgment, and as the order in reference to this allotment is not one of the grounds on which she appeals, we find no

exception to this part of the judgment. Rose McDonald Dewstoe assigns for error the court's failure to determine and adjudge the extent of her dower interest in the defeasible estate of her deceased husband. The judgment merely declares that she shall not claim dower in the lots conveyed to the plaintiff and that no other part of the judgment shall prejudice or affect her right to any dower she may have as surviving widow. In her brief she says that she requested the trial court to adjudge that she is entitled to dower in one-fourth in value of the entire tract except the lots conveyed to the plaintiff; but such request is not disclosed by the record. She prayed a separate appeal, but she has set out no specific assignment of error in the judgment. Rose McDonald Dewstoe is of course entitled to dower in the defeasible estate of her deceased husband (*Alexander v. Fleming,* 190 N. C., 815), but it was suggested on the argument that as the judge did not undertake to determine the present scope and extent of her right to dower, the question should be left open until in a formal proceeding it can be fully considered. In the present state of the record we concur in this suggestion. We find no reversible error.

No error.

COUNTY SAVINGS BANK OF ABBEVILLE, S. C., v. T. P. TOLBERT ET AL.

(Filed 9 June, 1926.)

1. Attachment—Courts—Jurisdiction—Affidavit.

Where in proceedings for attachment, it sufficiently appears of record that the court had jurisdiction of the subject-matter, it is unnecessary that the affidavit of the attaching creditors specifically allege its jurisdiction. C. S., 484, 799.

2. Deeds and Conveyances — Registration — Vendor and Purchaser — Statutes—Probate—Notice—Creditors.

While a defective probate of a deed to lands appearing upon its face is ineffectual to pass title as against creditors, etc., it is otherwise when the probate appears to have been in conformity with law, regularly taken by a notary public in South Carolina, and there is no evidence that the grantee in the commissioner's deed under the foreclosure of a mortgage had actual notice of the defect. C. S., 3294, 3311.

3. Same—Knowledge—Defective Probate—Burden of Proof.

The burden of proof is on a creditor claiming a priority of lien by judgment over a purchaser at a foreclosure sale under a mortgage by reason of the purchaser's knowledge of a defective probate of the mortgage not appearing thereon in the office of the register of deeds, to show such knowledge.

4. Same—Notaries Public of Other States.

While a probate of a mortgage taken in this State by a notary public of another state is defective, the purchaser at the mortgage sale will acquire by his deed the title as against a subsequent judgment creditor, when the probate appears of record in the office of the register of deeds in the county wherein the land is situate here to have been regularly taken in South Carolina, and there is no evidence that such purchaser had knowledge of the defect at or before the time he acquired his deed. This being an action for possession only, as to whether the purchaser at a mortgage sale has a right to redeem under the circumstances, *quære*, the same not presented in the instant case.

APPEAL by defendant from *Bryson, J.*, at October Term, 1925, of JACKSON. Reversed.

Action for possession of land. Plaintiff and defendant, both, claim title to the land in controversy from R. R. Tolbert, Jr., as the common source of their respective titles. The land is located in Jackson County, North Carolina.

Plaintiff claims immediately under deed from R. E. Cox and wife, dated 4 April, 1924, and duly recorded on said date. On 4 June, 1923, N. L. Sutton, sheriff of Jackson County, sold the land under an execution in his hands issued upon a judgment of the Superior Court of Jackson County, rendered in an action therein pending, instituted by County Savings Bank of Abbeville, S. C., as plaintiff against R. R. Tolbert, Jr., as defendant; the summons in said action, dated 30 October, 1922, was served by publication, upon said defendant, who was a nonresident of the State of North Carolina, but who had property in North Carolina; a warrant of attachment issued in said action was levied upon the land in controversy as the property of R. R. Tolbert, Jr. It was adjudged in said action that plaintiff recover of defendant the sum of $5,556.91, interest and costs, and that said judgment was a specific lien upon the land in controversy, by virtue of the attachment levied thereon. Under the execution issued on said judgment, the sheriff of Jackson County sold the said land, and by deed dated and recorded on 4 June, 1923, conveyed the same to R. E. Cox, the purchaser, at said execution sale.

Plaintiff contends that by virtue of said deeds, to wit, the deed of the sheriff to R. E. Cox and of R. E. Cox and wife to plaintiff, plaintiff is now the owner of all the right, title and estate of R. R. Tolbert, Jr., in and to said land, owned by him on 30 October, 1922, the date on which the attachment was levied therein in the action entitled "County Savings Bank *v.* R. R. Tolbert, Jr."

Defendant claims immediately under deed from Walter E. Moore, commissioner, dated 26 November, 1923, and duly recorded on said date. This deed was executed by the said commissioner, by virtue of a

decree made by the Superior Court of Jackson County, in an action entitled, "T. P. Tolbert *v.* R. R. Tolbert, Jr.," confirming the sale of said land, made on 5 November, 1923, at which defendant was the purchaser. This action was begun on 28 June, 1923, for the purpose of foreclosing a mortgage executed by R. R. Tolbert, Jr., to T. P. Tolbert, dated 13 June, 1922. The execution of said mortgage, was probated by a notary public of South Carolina on 13 June, 1922. The certificate of said notary public was adjudged by the clerk of the Superior Court of Jackson County to be correct and according to law; the mortgage, with the certificates of the notary public and of the clerk of the Superior Court of Jackson County were recorded in the office of the register of deeds of said county, on 19 September, 1922, in Book 87 at page 474.

Defendant contends that by virtue of said mortgage, recorded on 19 September, 1922—prior to the date on which the attachment under which plaintiff claims was levied upon said land: to wit, 30 October, 1922—and by virtue of the judgment and decrees in the action, entitled "T. P. Tolbert *v.* R. R. Tolbert, Jr." and of the deed of the commissioner conveying the land to him, his title to said land is prior to the title of plaintiff, and that, therefore, plaintiff is not entitled to recover of him possession of said land.

It is admitted, upon the record, that the mortgage, under which defendant claims, was executed in Asheville, North Carolina; that its execution was proven by a subscribing witness thereto before a notary public of South Carolina, in said city; that the certificate of said notary public was attached thereto in said city; and that the said mortgage was ordered to registration and registered in Jackson County, upon the certificate of said notary public. Plaintiff contends that for this reason the registration of the said mortgage was void and of no effect as to it, an attaching creditor, and subsequent purchaser for value.

The note secured by the said mortgage, and the mortgage purport, each on its face, to have been executed in South Carolina; the certificate of the notary public of South Carolina shows, upon its face, that it was signed by said notary public in said state. There is nothing on the face of the note, the mortgage, or the certificate as to its probate, which shows that it was executed or probated in North Carolina.

Upon the foregoing facts, established by the undisputed evidence, offered at the trial, the court was of the opinion that only questions of law were presented to the court for its decision, in order that a judgment might be rendered herein, determining the rights of the parties with respect to the possession of the land described in the complaint; that as there was no controversy as to the facts, it was not necessary that issues be submitted to the jury. Counsel for both plaintiff

and defendant, concurred in this opinion. Thereupon, in accordance with the opinion of the court, as to the law applicable to the admitted facts, judgment was rendered that plaintiff recover of defendant possession of the land described in the complaint. It was ordered that the action be retained on the docket that issues as to damages sustained by plaintiff on account of the wrongful possession of the land by defendant, might hereafter be submitted to the jury.

From this judgment, defendant appealed.

J. M. Nichols, Morgan & Ward and Alley & Alley for plaintiff.

Brooks, Parker & Smith, Walter E. Moore and Mays & Featherstone for defendant.

CONNOR, J. Defendant, by his appeal, presents two questions:

1. Were the affidavits upon which the orders were made for the publication of summons, and for the issuance of the warrant of attachment, in the action entitled, "County Savings Bank *v.* R. R. Tolbert, Jr.," sufficient to support said orders? We find no error in the holding of the court that the affidavits were sufficient, and that therefore, by virtue of the deeds under which it claims title to said land, plaintiff is the owner of all the right, title and estate of R. R. Tolbert, Jr., in and to said land at the date of the levying of the attachment, to wit, 30 October, 1922. It was not alleged specifically in said affidavits that "the Superior Court of Jackson County has jurisdiction of the subject of the action." There is no requirement in C. S., 484, or in C. S., 799, that such allegation shall be made specifically in the affidavit. In this case the jurisdiction of the court, as to the subject of the action, appeared from the facts alleged in the affidavits, and in the complaint, which was on file at the time the orders are made. This was sufficient, *Page v. McDonald*, 159 N. C., 43; *Bacon v. Johnson*, 110 N. C., 114; *Davis v. Davis*, 179 N. C., 185.

2. Was the registration of the mortgage from R. R. Tolbert, Jr., to T. P. Tolbert, under which defendant claims title to the land, void and of no effect, as against plaintiff, because the probate of the execution of the mortgage was in fact taken in North Carolina, by a notary public of South Carolina, this fact not appearing on the face of the certificate or in the mortgage?

C. S., 3294, provides that the execution of all such instruments and writings as are permitted or required by law to be registered may be proved or acknowledged before any notary public of any state or territory of the United States. If, in fact, as appears upon the face of the certificate, the probate of the execution of the mortgage in question had been taken in the State of South Carolina, by a notary public of

that State, the said certificate having been adjudged by the clerk of the Superior Court of Jackson County to be correct and according to law, the registration of the mortgage would have been valid. The mortgage, thus registered would have passed the property conveyed thereby, not only as against the mortgagor, but also as against his creditors, whose liens, and as against purchasers for value from him, whose titles were thereafter acquired. C. S., 3311. The purpose of the statute which provides that "no deed of trust or mortgage of real or personal estate shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor or mortgagor, but from the registration of such deed of trust or mortgage in the county where the land lies," is to protect creditors and such purchasers by giving them notice, upon the public records, of all facts affecting the title to property of others in which they have or may have an interest, *Smith v. Fuller,* 152 N. C., 7. It is well settled by repeated decisions of this Court that registration of a mortgage, upon proper probate, is notice to all persons of the existence of the mortgage, and of the right, title and estate in the property conveyed thereby of those who claim under the mortgage, duly registered; no notice, however full and formal, from any source other than the public registry will be held to affect the rights of creditors or purchasers for value, who may rely, under the policy of the law in this State, as evidenced by statutes and judicial decision, upon the valid registration of deeds and mortgages.

There are many decisions of this Court, however, in which it is held that a registration upon a defective probate is invalid and of no effect as to creditors or subsequent purchasers for value. It will be seen upon an examination of these decisions, that in each case the defect in the probate was apparent on the record, and that this fact is noted in the opinion of the Court. *Fibre Co. v. Cozad,* 183 N. C., 600; *Wood v. Lewey,* 153 N. C., 402; *Allen v. Burch,* 142 N. C., 525; *Lance v. Tainter,* 137 N. C., 250; *Land Co. v. Jennett,* 128 N. C., 4; *McAllister v. Purcell,* 124 N. C., 262; *Bernhardt v. Brown,* 122 N. C., 589; *Long v. Crews,* 113 N. C., 256; *White v. Connelly,* 105 N. C., 66; *Todd v. Outlaw,* 79 N. C., 235; *DeCourcy v. Barr,* 45 N. C., 181.

The identical question presented by this appeal has been considered and decided by this Court. In *Blanton v. Bostic,* 126 N. C., 419, it is said, "If the disqualification of either the probating or acknowledging officer appears upon the face of the record, the registration is a nullity as to subsequent purchasers and incumbrances. *Quinnerly v. Quinnerly,* 114 N. C., 145. But when the incapacity of the acknowledging or probating officer is latent, *i. e.,* does not appear upon the record, one who takes under the grantee in such instrument gets a good title, unless

the party claiming the benefit of the defective acknowledgment or probate is cognizant of the facts." See cases cited in the opinion of *Clark, J.*, and also *Guano Co. v. Walston,* 187 N. C., 667.

In *Spruce Co. v. Hunnicutt,* 166 N. C., 202, *Allen, J.*, cites with approval *Blanton v. Bostic, supra,* and says: "It is well settled that where the incapacity of an officer who takes a probate does not appear on the record, as in this case, one who takes under the grantee gets a good title." *Bailey v. Hassell,* 184 N. C., 450; *Ferebee v. Sawyer,* 167 N. C., 199. See note to *Woolridge v. LaCrosse Lumber Co.* (Mo.), 19 A. L. R., 1068.

The defect relied upon by plaintiff does not appear upon the record; it is not found or admitted as a fact that defendant had notice of such defect. The burden was upon plaintiff to show actual knowledge by defendant of the defect. There was error in holding that the registration of the mortgage was not valid, and for this error the judgment must be reversed.

It may be noted that the action to foreclose the mortgage from R. R. Tolbert, Jr., to T. P. Tolbert was begun on 28 June, 1923, and decree confirming sale of the land by the commissioner was returned on 28 November, 1923. The attachment under which plaintiff claims was levied on 30 October, 1922. The sheriff's deed, pursuant to sale of the land under execution, to R. E. Cox was recorded on 4 June, 1923. It does not appear from the record that plaintiff or the grantor, R. E. Cox, was a party to the action to foreclose the mortgage. This is an action for the possession of the land. Upon the admitted facts, plaintiff is not entitled to recover such possession of defendant. It does not follow, however, that plaintiff may not be entitled to redeem the land. *Jones v. Williams,* 155 N. C., 179. The judgment must be

Reversed.

KINGSLAND VAN WINKLE v. CATHOLIC MISSIONARY UNION ET AL.

(Filed 9 June, 1926.)

1. Wills—Intent—Interpretation—Surrounding Circumstances.

The intent of the testator as gathered from the relevant language used in the will construed in its entirety, will control its interpretation, and his surrounding circumstances will also be given consideration that may have clearly influenced him in making a disposition of his property.

2. Same—Residuary Clause.

A residuary clause of a will, wherever placed therein, will be given effect as such when by correct interpretation it appears that it was in conformity with the testator's intent, whether reference is therein

made to it as the residue of the estate after specific bequests or devises are provided for, or the words "rest" or "remainder," etc., are used by him.

CIVIL ACTION before *William B. Snow, Emergency Judge,* at March Term, 1926, of BUNCOMBE.

The judgment contains the facts material to the controversy. These facts are set out in the judgment as follows:

"That Mary W. Byrne, late of Asheville, North Carolina, died on or about 19 February, 1913, leaving a last will and testament and codicil thereto, which were duly admitted to probate in said Buncombe County, North Carolina, on 17 March, 1913, and are duly recorded in the office of the clerk of the Superior Court of said county, in Will Book 'C,' page 483 *et seq.,* a certified copy of which is set forth in the record in this case, and the plaintiff, Kingsland Van Winkle, is duly substituted and acting trustee under the said will.

"That the said testatrix, Mary W. Byrne, left surviving her one child, Rose M. Byrne, who died on 29 July, 1924, without ever having been married and without leaving issue, and leaving a last will and testament in which the plaintiff, Kingsland Van Winkle, was named as executor and who has duly qualified as executor of the said last will and testament.

"The question presented upon the record in this case is the construction of the will of Mary W. Byrne as to the disposition upon the death of Rose Mary Byrne of the remainder of the trust estate created by the provisions of the second paragraph of the said will of Mary W. Byrne, in the following words:

"If my said daughter, Rose Mary Byrne, shall survive me I give all said property, or the proceeds thereof, one-half to my said daughter absolutely forever free from the control of any husband; and the other half to the trustee hereinafter named in trust to invest and reinvest," etc., "and upon the death of my said daughter I give any then remaining principal of said trust to her issue, then surviving, absolutely forever; or if she shall leave no issue surviving her, then I give said then remaining principal to the same legatees as hereinafter provided for the residuary of my estate in the event that my said daughter shall not survive me nor leave issue surviving me."

By paragraph three of the will the testatrix provides as follows:

"If my said daughter shall not survive me, but shall leave issue surviving me, I give all my property and the proceeds thereof to her said issue, absolutely forever.

"It is my will that if any questions shall arise in construing this will, all doubts shall be resolved in favor of my said daughter, and her issue, if any."

By the fourth paragraph of the will the testatrix provides:

"If my said daughter shall not survive me nor leave issue surviving me, then I give to" (certain named legatees certain pecuniary and specific bequests).

By the fifth paragraph of the will the testatrix provides:

"All the rest, residue and remainder of all my property or the proceeds thereof, including any legacies that may lapse or for any other reason be ineffective, I give (if neither my said daughter nor issue of her shall survive me) to the above named Apostolic Mission House for the purpose of its incorporation, and request that said legacy be known as 'The Byrne Fund for the Propagation of the Faith.'"

The court is of opinion, and so holds, that construing and interpreting the will from the language of the instrument as a whole to ascertain and arrive at the intention of the testatrix, and applying the rules of construction laid down and announced by the courts, the intention of the testatrix was and the will shall be so construed that upon the death of Rose Mary Byrne without issue, the said trust estate went to the legatee named in the fifth clause or paragraph of the will, to wit, Apostolic Mission House, under and by virtue of the provisions in the second paragraph or clause of the will in the following words: "or if she shall leave no issue surviving her, then I give said then remaining principal to the same legatees as hereinafter provided for the residuary of my estate in the event that my said daughter shall not survive me nor leave issue surviving me."

The court being of the opinion that the testatrix intended to designate as the person to whom said estate should go in the event above named and which was the event which actually happened, the object of her testamentary intention described and named in the fifth paragraph of the will, and that the said fifth paragraph of the will is the residuary clause referred to and intended in the above quoted portion of the second paragraph of the will.

It being alleged in the complaint and admitted in the answer and found as a fact by the court in this cause that Apostolic Mission House is owned by the defendant, Catholic Missionary Union, a corporation organized under the laws of the State of New York, and having its principal place of business in New York City, N. Y.

Wherefore, it is ordered, adjudged and decreed by the court that Kingsland Van Winkle, substitute trustee of the last will of Mary W. Byrne, make distribution of the remainder of the property now in its hands and which may be subsequently received by him, being the remainder of the trust estate aforesaid, in accordance with the will of Mary W. Byrne, as herein construed by the court, to Catholic Missionary Union, the owner of Apostolic Mission House and to pay over any

moneys in his hands belonging to said trust estate to the said Catholic Missionary Union and to execute and deliver proper deeds to the said Catholic Missionary Union for the real estate belonging to said trust estate, the same being an undivided one-half interest in the lands situate in Kanawha County, West Virginia, mentioned in the complaint.

From the foregoing judgment plaintiff appealed.

Thomas J. Harkins for plaintiff.

Merrick-Barnard & Heazel for defendant, Catholic Missionary Union.

BROGDEN, J. There are, at least, two propositions of law settled in this State beyond dispute. These are: First, the fundamental object in construing a will is to discover and effectuate the intention of the testator; and, second, this intention must be arrived at by an examination of the entire will when read in the light of all the surrounding facts and circumstances. *Pilley v. Sullivan,* 182 N. C., 493; *Witty v. Witty,* 184 N. C., 375; *Gordon v. Ehringhaus,* 190 N. C., 147.

It appears from the facts found by the trial judge that Rose Mary Byrne survived the testatrix, Mary W. Byrne, and died without ever having been married and without issue. Therefore, items three and four of the will of Mary W. Byrne have no application.

In item two of the will it is provided "if she (Rose Mary Byrne) shall leave no issue surviving her, then I give said the remaining principal to the same legatees as hereinafter provided for the residuary of my estate," etc. We think the words "residuary of my estate" refer to the residuary clause of the will, which is item five thereof, and that under the provisions of item five the defendant takes the property in dispute. It is contended by the plaintiff that item five is not a residuary clause. The legal characteristics of a residuary clause in a will are described as follows, by *Walker, J.,* in *Faison v. Middleton,* 171 N. C., 170. "'Residue,' meaning that which remains, no particular mode of expression is necessary to constitute a residuary clause. The words 'rest,' 'residue,' or 'remainder' are commonly used in the residuary clause, whose natural position is at the end of the disposing portion of the will; but all that is necessary is an adequate designation of what has not otherwise been disposed of, and the fact that a provision so operating is not called the residuary clause is immaterial." In discussing the question of a residuary clause in a will the learned *Justice* says further: "In order to ascertain what is given, or whether any particular thing is well given, by a specific gift, you must look to see whether that particular item is included. The question is whether it is included or not; but once given a residuary gift large enough in its language to comprehend residue, the question is, not what is included, but what is excluded." *Gordon v. Ehringhaus,* 190 N. C., 147.

Applying these principles of law to the facts presented in the record, it is obvious that item five constitutes the residuary clause of the will, and that, by virtue of reference thereto in item two of the will, the defendant, Catholic Missionary Union, is entitled to the property. Therefore, the judgment of the court was correct. The substituted trustee shall pay the cost out of the fund before distribution is made.

Affirmed.

J. I. MASON, DOING BUSINESS AS MASON & COMPANY, v. TOWN OF ANDREWS.

(Filed 9 June, 1926.)

1. **Contracts—Interpretation—Audits—Accountants—Mistakes and Inaccuracies—Damages.**

   Where there is a contract for the complete auditing of defendant's books, plaintiff to be paid per diem for work done, if there are mistakes and inaccuracies, such mistakes and inaccuracies are an element in the completeness and value of the audit, and the plaintiff is entitled under the contract to the amount per diem as agreed upon, less so much as it would take to reform the audit and make it accurate.

2. **Same—Instructions—Appeal and Error.**

   A charge on the foregoing contract that mistakes and inaccuracies in the audit be taken into consideration only as to the amount of time devoted to the work, and that such mistakes should not be considered upon the value of the audit, is reversible error.

APPEAL by defendant from *Walter S. Siler, Emergency Judge,* and a jury, at February Term, 1926, of CHEROKEE. New trial.

The plaintiff alleges that he was a duly licensed and certified public accountant engaged in business in the city of Asheville. The defendant is a municipal corporation, and through its duly authorized agent "employed the plaintiff to make a complete audit of the books of the town of Andrews, for and in behalf of said municipality, and it agreed that the plaintiff was to receive therefor compensation at the following rates: $25.00 per day and expenses for a certified accountant, and $20.00 per day for a junior accountant, seven hours to constitute a day. That the compensation so agreed upon was fixed and decided upon on 19 April, 1924, as a compromise rate after a misunderstanding between the plaintiff and defendant as to the rates to be charged therefor." That the audit per the agreement was duly made and the cost was $1,956.25.

Defendant admits the contract, but alleges, among other things, "That the plaintiff came to the town of Andrews about 1 April, 1924, and

began the work upon said books of the defendant, and remained there with an assistant, which plaintiff had brought with him, for six or seven days, when the plaintiff represented to the defendant and led the defendant to believe that said work was practically completed and finished, and all that remained to be done was the working out of some minor details, which plaintiff, as represented by him, could do just as well in the city of Asheville, and took the books and papers of the defendant to said city of Asheville, as represented by the plaintiff, to work out said minor details and complete said audit, representing and leading defendant to believe at the same time that said audit was practically completed. That the plaintiff kept said books in the city of Asheville for a period of about two months, or longer, before making any report of any kind to the defendant," etc.

Defendant further says and alleged that the plaintiff further breached his said contract with the defendant in that he failed and refused to carry on said audit in a regular and business-like way and manner, and charged for at least twice as much time as was necessary for a competent auditor or accountant to audit and make out his report upon its said books. . . . That as a result of the numerous errors and defects in the work the plaintiff in his said pretended report and audit of the books of the defendant, it will be and is necessary for the defendant to have its books re-audited at once.

On 12 December, 1924, the defendant wrote the plaintiff as follows: "A meeting was held last night by the board of aldermen of the town of Andrews, N. C., and the board is satisfied that your bill of $1,956.25, dated 21 June, 1924, for auditing the town records is absolutely unreasonable for the work performed, and the board refuses to authorize payment of that amount. Therefore your draft will not be honored. The board is anxious to get this matter adjusted upon a reasonable basis, and trust the same can be done in a manner satisfactory to all concerned in the very near future."

At the conclusion of the testimony, the court below instructed the jury that if they believed all the evidence and found the facts to be as testified, they should answer the first issue "No," and the issue was so answered, and the case then submitted to the jury upon the second issue. To this instruction the defendant in apt time excepted, assignment of error No. 17.

The court below charged the jury as follows: Exception and assignment of error No. 20: "The only matter that addresses itself to you is what sum is the plaintiff entitled to receive under the contract for the services rendered by him, and the court submits to you one issue: In what sum, if any, is the defendant indebted to the plaintiff? It is a matter, gentlemen, for you; it is purely and simply a question of fact

for you to find how much time, under the evidence, the burden being upon the plaintiff in the case, that they did put in, and allow pay for it at the rate of wages agreed upon in the contract. As I have stated before, you having nothing to do with their contract, but only passing upon the time that was consumed, the days and hours of labor that the plaintiff has expended in the performance of his contract. The court charges you that such mistakes or such inaccuracies as it may contain, if you find that it does contain such, would be considered by you as a circumstance, if you find that such inaccuracies and mistakes did occur, as to the amount of time that was devoted to the work, and not as to the value of the audit. That matter is not before you; it is not a question as to whether it was accurately done or whether it is complete or not; it has been contracted for and has been received by the defendants, and that question is not before you as to its value, or whether or not it has any value; you are only to find what the plaintiff is entitled to recover under his contract, and you will take into consideration the time necessary to do the work; you will take into consideration the item of expense while they were engaged in the work at Andrews, and the transportation from Asheville to Andrews."

The issues submittted to the jury and their answers thereto, were as follows:

"1. Did the plaintiff breach the contract as alleged in the answer? Answer: No.

"2. In what sum, if any, is the defendant indebted to the plaintiff? Answer: $1,850.00."

The other assignments of error we do not think necessary to consider.

D. Witherspoon and D. H. Tillett for plaintiff.
Moody & Moody for defendant.

CLARKSON, J. It may be noted that no time is specified in the contract when the work should be completed. To be sure the contract was to make a complete audit of the books of the town, but this must be done within a reasonable time. If this was not so, where no time is mentioned, a party who is employed to do certain work, may take an unlimited time—such is not the law.

13 C. J., p. 685, sec. 782, says: "The question as to what is a reasonable time for the performance of a contract, fixing no time for performance, depends on the nature of the contract and the particular circumstances. In deciding whether an undertaking has been performed within a reasonable time, the material difficulties and hazards attending it, the amount of diligence used, and frustrated attempts at performance should be considered. Perhaps as accurate a definition of reasonable

time as may be given is that it is such time as is necessary conveniently to do what the contract requires should be done." *Holden v. Royall,* 169 N. C., 678; *Lambeth v. Thomasville,* 179 N. C., 456; *May v. Menzies,* 186 N. C., 149; *Colt v. Kimball,* 190 N. C., 173; *Cowles v. Hagerman* (New Mexico), 110 Pac. Rep., 843.

It is admitted that the contract between the parties was to make a complete audit of the books of the town. The defendant alleges that the charge was at least twice as much as was necessary; that as a result of the numerous errors and defects of the pretended report and audit it will be necessary for defendant to have the books re-audited. Defendant, in its letter to plaintiff stated that it was anxious to get the matter adjusted on a reasonable basis. Defendant did not deny that plaintiff was entitled to some pay for the audit, nor was the audit rejected in the entirety.

We think that there was sufficient evidence to be submitted to the jury that the audit was not complete on account of mistakes and inaccuracies. The court below on this aspect charged the jury that if they should find such inaccuracies and mistakes did occur this would be considered as a circumstance as to the amount of time that was devoted to the work and not as to the value of the audit. We cannot so hold. The charge is not altogether clear, but it would indicate that it would make the town pay for the time plaintiff took in making the mistakes and inaccuracies in the audit. But we think, under the facts and circumstances of this case, the mistakes and inaccuracies, if there were any, go to the value of the audit. The contract was to make a complete audit—the time taken defendant claimed was unreasonable. Defendant received the audit, but objected to the time taken and mistakes and inaccuracies. If there were mistakes and inaccuracies, as the evidence tended to show, plaintiff would be entitled, under the contract, to the amount per diem as agreed upon for a reasonable time in making the audit less so much as it would take to reform the audit and make a complete audit, in accordance with the contract.

The principle here is well stated in *McCormick v. Ketchum,* 48 Wis., p. 646, where the following charge is sustained: "If the plaintiff's services were worthless, or of no value, he is not entitled to recover anything, but if they are of value, he is entitled to recover that value."

This matter has been discussed recently by *Varser, J.,* in *Moss v. Knitting Mills,* 190 N. C., p. 648. It is there said: "The reasonable cost of the labor to remedy any defects for which plaintiff was responsible, was the correct rule under the instant case." *Howie v. Rea,* 70 N. C., 559.

For the reasons given, there must be a

New trial.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1926

JAMES N. UMSTEAD v. THE BOARD OF ELECTIONS OF DURHAM COUNTY.

(Filed 15 September, 1926.)

1. Mandamus—Elections—Primaries—County Board of Elections.

The plaintiff in proceedings for mandamus to compel the county board of elections to declare him the successful candidate of his party in a primary election, or that he is entitled to a second primary to select between himself and another candidate for the same office, must show the denial of a present, clear legal right, by the failure of such board to have done so.

2. Same—Second Primary—State Board of Elections.

Where a county is entitled to two representatives in the Legislature, and the highest two of the three who ran in the primary have received a majority of the votes cast, the one receiving the lowest number of votes for representative is not entitled to the ordering by the county board of elections of a second primary for the nomination in competition with the one who has received a majority of the votes cast in the first primary, and more than the plaintiff in mandamus has received therein, and the method directed by the State Board of Elections becomes immaterial under the circumstances.

3. Same—Written Notification.

In order for a candidate for the party nomination for the Legislature to obtain a writ of mandamus against the county board of elections to compel the ordering of a second primary, he must show that his opponents receiving the larger number of votes have not received a majority of the votes cast for said nomination, and within five days after the

result has been officially declared and he has been notified thereof, he must have filed with the county board of elections a written request that the second primary be called by it. C. S., 6045.

APPEAL by plaintiff from order of *Schenck, J.*, dated 26 June, 1926, at Chambers, Durham, N. C. Affirmed.

This action was commenced on 16 June, 1926, to procure a writ of mandamus, commanding the board of elections of Durham County to place the names of James N. Umstead and R. O. Everett upon a ticket to be voted at a primary election to be held in said county on 3 July, 1926, as candidates for nomination by the Democratic Party for representatives from Durham County, in the General Assembly of North Carolina, session 1927. From order denying the writ, plaintiff appealed to the Supreme Court. The only assignment of error on this appeal is based upon an exception to the order signed by the judge.

W. S. Lockhart for plaintiff.
Fuller, Reade & Fuller and James W. Barbee for defendant.

CONNOR, J. Under the apportionment made by the General Assembly of North Carolina of members of the House of Representatives to the several counties of the State, as required by the Constitution, Art. II, secs. 5 and 6, Durham County elects two members of said house, C. S., 6088. At the primary election, held as required by statute, C. S., 6018 *et seq.*, in Durham County, on 5 June, 1926, for the nomination by political parties of candidates for offices, to be voted for at the general election to be held in November, 1926, there were three candidates, to wit: S. C. Brawley, R. O. Everett and James N. Umstead, for nomination by the Democratic Party as representatives from Durham County. Each had duly complied with the requirements of the statutes, and was a duly qualified candidate for such nomination. Thus there were three candidates and two nominations to be made. There is no provision in the statute, relative to primary elections, that candidates for nomination as representative from a county, which under the apportionment made by the General Assembly, elects more than one representative, shall be classified or voted for, with respect to any one of said offices to which they aspire. Each voter in Durham County, qualified to vote in the Democratic primary, had the right to vote for one but not more than two of the three candidates, as the Democratic nominee for representative from said county.

Upon a canvass of the votes cast in the primary election, held on 5 June, 1926, in Durham County, it was ascertained that 3301 votes had been cast for S. C. Brawley, 3065 for R. O. Everett, and 2724 for James N. Umstead. No one of said candidates was entitled to be declared the

nominee of his party for representative unless he received a majority of the votes cast for the nomination for which he was candidate, C. S., 6045. It was the duty of the board of elections of Durham County, not only to tabulate the returns made by the judges and registrars of the several precincts in the county, but also to declare and publish the results, C. S., 6042. In order to determine whether either of the three candidates had been nominated, it was necessary that the board of elections should determine the number of votes cast for the nomination, for no candidate could be declared a nominee unless he had received a majority of the votes cast. It therefore became the duty of the board of elections to ascertain the number of votes cast in said primary for the respective nominations for which Messrs. Brawley, Everett and Umstead were candidates.

On 8 June, 1926, as soon as the number of votes received in the primary election by each of the three candidates had been tabulated and ascertained, but before the result had been published by the board of elections, plaintiff, James N. Umstead, filed with the board a request, in writing, for a second primary, to nominate a Democratic candidate for representative from Durham County, requesting that the names of R. O. Everett and James N. Umstead be placed upon a ticket to be voted for in said primary, as candidates for said nomination. Thereupon, before acting upon said request and being in doubt as to whether any nomination had been made in said primary, the board of elections of Durham County submitted to the State Board of Elections the results of the primary election, held on 5 June, 1926, in said county, for the nomination of candidates of the Democratic Party for representatives from Durham County, and requested a ruling by said State board as to whether either of said candidates had received a majority of the votes cast for the nomination which he sought. The State Board of Elections was also advised of the request of James N. Umstead for a second primary, in which he and R. O. Everett should be declared candidates for nomination as representative from said county.

The State Board of Elections advised the county board that upon the facts submitted to said State board, in order to ascertain the number of votes cast for the nomination as representative from Durham County, the total number of votes cast for all three candidates should be divided by the number of nominations to be made; that if upon applying this rule, it should be ascertained that each of the candidates had received a majority of the votes cast for the nomination which he sought, then the two candidates receiving the highest number of votes should be declared the nominees of the primary as representatives from Durham County, and that under the statute applicable, the county board of elections had no power to order a second primary.

At a meeting held on 11 June, 1926, the county board of elections adopted the rule as advised by the State Board of Elections. The total number of votes cast for the three candidates was 9090; one-half of this number is 4545; each of the candidates therefore had received more than a majority of the votes cast, as thus determined; Mr. Brawley and Mr. Everett having received the highest number of votes were declared the Democratic nominees for representatives from Durham County and were so certified by the board of elections. The said board declined to order a second primary, as requested by the plaintiff. By this action, plaintiff prays that a writ of mandamus be issued to compel the board of elections of Durham County to order a second primary and to place the names of R. O. Everett and James N. Umstead on tickets to be voted in said primary, as candidates for the Democratic nomination as representative from Durham County. Plaintiff concedes that S. C. Brawley has been lawfully declared to be a Democratic nominee for the office of representative from Durham County, whether he received a majority of the votes cast or not. His right to the nomination has not been challenged by a request for a second primary.

Plaintiff is not entitled to the issuance of said writ, unless he has a "present, clear legal right" which has been denied by defendant, and unless it is the duty of the defendant to grant his request as a ministerial act, required of said board by statute. *Britt v. Board of Canvassers,* 172 N. C., 797. It is only when rights asserted by a plaintiff, in an action for a mandamus, are manifest, and the duty of defendant is ministerial, that plaintiff is entitled to relief by the issuance of the writ of mandamus. *Johnson v. Board of Elections,* 172 N. C., 162. This principle is so well settled that citation of authorities does not seem necessary. *Lenoir County v. Taylor,* 190 N. C., 336; *Person v. Doughton,* 186 N. C., 723. In the opinion in the latter case, written by the present *Chief Justice,* it is said: "Mandamus lies only to compel a party to do that which it is the duty to do without it. It confers no new authority. The party seeking the writ must have a clear legal right to demand it, and the party to be coerced must be under a legal obligation to perform the act sought to be enforced. *Missouri v. Murphy,* 170 U. S., 78; *Withers v. Comrs.,* 163 N. C., 341; *Edgerton v. Kirby,* 156 N. C., 347; *Betts v. Raleigh,* 142 N. C., 229. As to when the writ will issue generally, see note to *M'Cluny v. Silliman,* 4 L. Ed., 263."

Plaintiff, as one of the candidates for nomination as a representative by the Democratic Party from Durham County in the primary election held in said county on 5 June, 1926, was not entitled to have the board of elections of said county hold a second primary as requested by him (1) unless no aspirant for said nomination received a majority of the votes cast in said primary for said nomination, and (2) unless he received the

second highest number of votes cast for said nomination in said primary and (3) unless within five days after the result of such primary election had been officially declared and he had been notified of such declaration he filed with said board a request, in writing, that said second primary be called and held. C. S., 6045. The burden was upon plaintiff to establish these facts; plaintiff has no "present, clear legal right" to the call of a second primary and defendant has no duty—indeed, has no power, under the statute—to call such primary, until these facts have been established.

The county board of elections has officially declared that as the result of the primary held on 5 June, 1926, Messrs. Brawley and Everett are the Democratic nominees for representatives from Durham County; whether the method adopted by the board in making this declaration is correct or not, plaintiff has failed to show that no aspirant for the nomination received a majority of the votes cast; it does not appear that plaintiff received the second highest number of votes cast for said nomination, as required by the statute; nor does it appear that within five days after the result was officially declared and he had been notified of such declaration, he requested the call of the second primary. The result of the primary held on 5 June, 1926, was declared on 11 June, 1926; the request for the second primary was made on 8 June, 1926, before the result had been declared by the board. We must therefore hold that plaintiff, having failed to show a "present, clear legal right," was not entitled to the writ of mandamus as prayed for.

Whether the method adopted by the board of elections for declaring the result of the primary be correct or not, need not be decided upon this record. It is conceded that this method was adopted by the board of elections without express statutory authority; the method of determining the result of the primary suggested in plaintiff's brief, is also without such authority. If it be contended that the method adopted by the board is based upon an arbitrary assumption, the same must be said of the method suggested by the plaintiff. The purpose of an election is to choose some one of the candidates for the office or position to which he aspires, affirmatively and not by the exclusion of other candidates. The method adopted by the county board of elections upon the advice of the State Board of Elections has the merit, at least, of determining the nominees without the necessity of numerous primary elections. As said of this method by *Judge Hoke* in *Johnston v. Board of Elections*, 172 N. C., 162, "It may be that the board, in adding up the entire vote for all the candidates and dividing the amount by the number of places to be filled, pursued the correct method for ascertaining the number of votes cast at the primary." No candidate can be declared the nominee of the primary by this method of determining the result, when the

number of candidates exceeds the number of nominations to be made, unless he has received a majority of the votes cast as required by the statute. Messrs. Brawley and Everett, having each received a majority of the votes cast for the nominations in the primary held on 5 June, 1926, as determined by the county board of elections, are the Democratic nominees for representatives from Durham County. Plaintiff, having failed to show a clear legal right to a second primary as alleged by him, was not entitled, under the statute, to a second primary.

The order denying the writ of mandamus, upon the facts of this record, is

Affirmed.

CHARLES U. MILLER v. FARMERS FEDERATION, INC.

(Filed 15 September, 1926.)

1. **Contracts, Written—Parol Evidence—Statute of Frauds.**

Where a contract concerning the subject-matter is not required to be in writing, and is partly written, parol evidence is admissible to show the unwritten part so that the contract in its entirety may be enforced when the unwritten part does not vary, add to or contradict that which has been reduced to writing.

2. **Same—Telegrams—Letters.**

Where a contract rests in parol in part, and the party to be charged has thereafter by letter or telegram confirmed this part of the contract, he may not avoid his obligation thereunder under the statute of frauds, and the entire contract will be considered as having been reduced to writing, and parol evidence concerning the subject-matter will be construed as having merged into the various writings.

3. **Same—Fraud—Mistake—Parol Evidence.**

Only when a written contract is vitiated by fraud, mutual mistake or some other equitable element, is parol evidence admissible to contradict, add to or vary that which has been reduced to writing by the parties thereto.

CIVIL ACTION, tried before *Brock, Emergency Judge,* at January Term, 1926, of HAYWOOD.

The only issue submitted to the jury was: "Is the defendant indebted to the plaintiff, and, if so, in what amount?"

The jury answered the issue $489.13 with interest from 1 October, 1924.

From judgment thereon the defendant appealed.

Morgan & Ward for plaintiff.

J. W. Ferguson and Carter, Shuford & Hartshorn for defendant.

BROGDEN, J. The plaintiff brought suit upon a verbal contract with the defendant, which, according to the testimony, is substantially as follows: "That on or about 6, 8, or 10 September the plaintiff met Mr. Dodd, manager of the marketing department of the defendant, and asked him if he was in the market to buy apples. Dodd replied that he was and desired to know of plaintiff if he had a car-load of York apples and how soon he could get them out." Plaintiff testified further: "I then asked him what they were worth or what he would pay for them. He said he thought he could get $4.00 a barrel, and that he would let me know within the next day or two about handling a car. I believe that was the extent of that conversation I had with him in person. The next day or probably two days afterwards Mr. Dodd called me up on the phone and said he would take a car of York apples at $4.00 a barrel. Then I asked him about the pay. He said they would pay for them at $4.00 a barrel within ten days, . . . and that he would send me shipping instructions." It was further agreed, according to plaintiff's testimony, that the plaintiff was to allow the defendant five per cent commission and a small brokerage fee not exceeding $15.00.

On 12 September, the defendant wrote the following letter to the plaintiff: "We beg to hereby confirm our phone conversation booking minimum car No. 1 Yorks at $4.00 per bbl., less 5 per cent commission to us and $15 brokerage fee. Ship this car on order notify B/L as follows: Order of Farmers Federation, destination, Augusta, Ga. Notify Merry & Co., Augusta, Ga. Note on B/L allow inspection. Kindly forward to us all papers properly signed immediately upon finishing loading.

FARMERS FEDERATION, INC.,
By F. F. Dodd, *Mgr., Marketing Dept.*,
Per G. S. C."

On 17 September, the plaintiff wrote the following letter to the defendant: "I am shipping today as per your order of the 12th one car of No. 1 apples, destination, Augusta, Ga., order of Farmers Federation. Notify Merry & Co., Augusta, Ga. This car contains 18 bbls. Gano's at $3.75 per, and 146 bbls. of Yorks at $4.

	$ 67.50
	584.00
	$ 651.50
Less 5% commissions to you	32.57
	$ 618.93
Less commissions at Augusta, Ga.	15.00
	$ 603.93
Less 164 bbls. at 70c	114.80
	$ 489.13

P. S.—I am picking today about 75 bu. of Albemarle Pippins, this is real nice stock and I want $1.25 per basket of one bushel, f. o. b. Waynesville, N. C. I wish you would see just what you can do with it in your city and let me know at your earliest convenience.

Yours very truly, CHAS. U. MILLER."

On 25 September, F. F. Dodd sent the following telegram to the plaintiff: "Have seen car fruit not a grade and Merry refuses on any terms will endeavor to place car on consignment with reliable dealers if satisfactory to you wire care Walton and Company here.

(Signed) F. C. DODD."

On 26 September, the defendant contended that the plaintiff filed for transmission to F. F. Dodd, Augusta, Ga., the following telegram: "Place car on consignment or sell straight if you can.

(Signed) CHAS. U. MILLER."

This telegram was not received by Dodd. Plaintiff was asked on cross-examination in regard to this telegram: "(Q.) Is not that the telegram you sent? (A). No sir, I don't think it is. It might be, but if I sent him one at all, it was more than that. I don't think that is all of it."

Between the letter of 12 September, and the letter of 17 September, the plaintiff and the defendant had verbally agreed that the plaintiff could fill out the car by substituting a certain number of barrels of Gano's apples.

Did the foregoing transaction constitute a sale by the plaintiff to the defendant, or was the defendant really acting as agent or broker for the plaintiff?

Plaintiff contends that the contract in question is a verbal contract. Upon the other hand the defendant contends that the correspondence constitutes a contract in writing between the parties, and that the written contract supersedes and merges the parol contract sued on.

There are certain well defined principles applicable to the construction of parol and written contracts. These principles, pertinent to the merits of this case, may be classified as follows: 1. Parol testimony cannot be admitted to contradict, add to, or vary a written contract in the absence of fraud, ignorance, mistake or other available defense, warranting a rescission or cancellation. This rule is intended for the "protection of the provident" and not for the "relief of the negligent." *Patton v. Lumber Co.*, 179 N. C., 103; *Watson v. Spurrier*, 190 N. C., 729.

2. If the contract is not one which the law requires to be in writing and a part thereof is oral, evidence of the oral portion is admissible,

if it does not contradict or vary the writing, for the purpose of establishing the contract in its entirety. *Typewriter Co. v. Hardware Co.*, 143 N. C., 97; *Palmer v. Lowder*, 167 N. C., 331; *Henderson v. Forrest*, 184 N. C., 234.

3. If a parol agreement and a written agreement, dealing with identical subject-matter, are totally inconsistent, the written agreement must stand. *Walker v. Cooper*, 150 N. C., 131; *Woodson v. Beck*, 151 N. C., 144; *Colt v. Turlington*, 184 N. C., 137; 6 R. C. L., 923.

There was no objection or exception to the testimony of the plaintiff in regard to the verbal agreement constituting the basis of the suit. If there was a written contract about the same subject-matter between the parties, this testimony in so far as it contradicted or varied the writing would be inadmissible, but, having been admitted, without protest, the objection was waived. *Dobson v. R. R.*, 132 N. C., 901; Wigmore on Evidence, 2 ed., vol. 1, sec. 18, *et seq.*

The determinative proposition therefore is whether or not the writings are totally inconsistent with the verbal contract of sale. The letter of 12 September, from the defendant to the plaintiff confirms the phone conversation between the parties. This statement in writing recognizes the existence and efficacy of the prior verbal agreement. The letter also refers to 5 per cent commission and $15.00 brokerage fee. These items were also contained in the verbal contract. The letter of 12 September, further gave shipping instructions which were in accordance with the verbal agreement as testified to by the plaintiff, and named the price of $4.00 a barrel in accordance with said agreement. The letter of 17 September from the plaintiff to the defendant referred to the same items as well as to the few barrels of Gano's to fill out the car, this also being in accordance with the verbal understanding between the parties. The statement of the account contained in the letter mentioned the same items of brokerage and commission in accordance with the verbal understanding.

The strongest piece of evidence supporting the contention of the defendant is the purported telegram from the plaintiff, dated 26 September, but the plaintiff does not admit either the sending of the telegram or that the language of the purported telegram was correct. As to whether or not this telegram was sent was a question of fact for the jury.

We are therefore of the opinion that the correspondence between the parties is not totally inconsistent with the parol agreement, but that, on the other hand, the correspondence constitutes a written memorial of the verbal agreement and fully recognizes the existence of the verbal contract alleged by the plaintiff.

The charge of the court is not a part of the record and therefore it must be presumed that the jury was correctly instructed as to the

competency and relevancy of evidence, circumstances under which it could be used by them, and as to what extent it could be considered. *S. v. Stancill,* 178 N. C., 685.

It appearing therefore that the jury has answered the issue submitted, under what must be assumed to be a proper charge of the court, the judgment as rendered is sustained.

No error.

WILLIE L. FARROW AND WILEY C. RODMAN v. AMERICAN EAGLE FIRE INSURANCE COMPANY OF NEW YORK.

(Filed 15 September, 1926.)

Insurance, Fire—Judgments—Contracts — "Unconditional Ownership"—Liens.

Where the plaintiffs' grantee of lands has obtained judgment against a former claimant of title that he is entitled to the possession thereof subject to the improvements in a certain amount put thereon by the claimants, with order that if not paid within a stated period the lands be sold and the proceeds applied to this payment, etc., and thereafter when the lands were subject thereto the plaintiffs have acquired the lands and insured the buildings thereon against fire in the defendant company, a clause in the policy avoiding the company's liability if the ownership be otherwise than sole and unconditional is not rendered void by the judgment above mentioned, and the plaintiffs may recover upon the policy for loss by fire occurring within the period covered by the policy.

APPEAL by defendant from *Grady, J.,* at February Term, 1926, of BEAUFORT.

Civil action to recover for loss by fire, under a policy of insurance issued by the defendant.

From a verdict and judgment in favor of plaintiff, the defendant appeals, assigning errors.

Wiley C. Rodman and Ward & Grimes for plaintiffs.
Stephen C. Bragaw for defendant.

STACY, C. J. The appeal presents but a single question: Was the plaintiff the sole and unconditional owner of the insured premises at the time of the issuance of the policy in suit? If this be answered in the affirmative, it is conceded that the judgment is correct and should be affirmed; otherwise it is erroneous and ought to be reversed.

In 1914, plaintiff's father, Morgan Farrow, owned a tract of land in Beaufort County containing approximately twenty-two acres. He told his

daughter, Lizzie Davis, that he would convey to her three acres of said land if she and her husband would make a home-site out of it and build a house thereon. This parol offer was accepted and the house erected, but no deed was ever made to Lizzie Davis for the three acres. Later Elijah Gray acquired title to all the land and sought to eviet Lizzie Davis and her husband in 1922. It was adjudged in said ejectment suit that "Elijah Gray is the owner in fee and entitled to the possession of all the land described in the complaint, including the said three acres"; but that the defendants are entitled to recover of the plaintiff the value of the improvements placed thereon, to wit, $550.00, and if not paid within ninety days, the said three acres, with improvements, shall be sold, after due advertisement, as required by law, to satisfy said judgment, the surplus remaining, if any, to be paid to Elijah Gray.

This judgment was outstanding and unsatisfied and the Davises in possession of the house when the plaintiff acquired title to the property by deed from Elijah Gray, dated 12 February, 1923. Five days thereafter, the policy of insurance now in suit was issued by the defendant to protect the plaintiff against loss or damage to the house by fire. The house was destroyed by fire 17 June, 1923, while Gus and Lizzie Davis were away from home.

The existence of the above mentioned judgment was not known to the insurance company at the time of the issuance of the policy, and it is contended that said judgment avoids the contract of insurance under the stipulation contained therein that "This entire policy is void . . . (a) if the interest of the insured is other than unconditional and sole ownership." The following authorities are cited by the defendant, as supporting, either directly or in tendency, its position in the matter: *Hardin v. Ins. Co.*, 189 N. C., 423; *Watson v. Ins. Co.*, 159 N. C., 638; *Weddington v. Ins. Co.*, 141 N. C., 234; *Hayes v. Ins. Co.*, 132 N. C., 703.

It is the holding with us that, as a general rule, a judgment vests no estate or interest in the land upon which it is a lien, but only gives to the creditor the right to have the land appropriated to the satisfaction of the judgment. *Brown v. Harding,* 170 N. C., p. 266; *Bruce v. Nicholson,* 109 N. C., 202; *Baruch v. Long,* 117 N. C., 509; *Bryan v. Dunn,* 120 N. C., 36; *Murchison v. Williams*, 71 N. C., 135. "A judgment creditor has no *jus in re* or *jus ad rem* in the defendant's land, but a mere right to make his general lien effectual by following up the steps of the law and consummating his judgment by an execution and sale of the land."—*Ashe, J.*, in *Dail v. Freeman*, 92 N. C., 351. This is so, even where the judgment is declared a specific lien on a given piece of property, otherwise a tax levy, or a street assessment, might be considered as a defect of title, within the meaning of the clause now under considera-

tion, and it has never been thought that such assessments render the ownership of property other than sole and unconditional, so as to work a forfeiture of a policy of insurance. *Hahn v. Fletcher,* 189 N. C., 729; *Bank v. Watson,* 187 N. C., 107; *Kinston v. R. R.,* 183 N. C., 14; *Roy v. Abraham,* 207 Ala., 400; 25 A. L. R., 101.

In this respect a mortgage or a decree affecting the title to property, is different from an ordinary judgment, or one such as we are dealing with in the instant case. We think the trial court correctly held that the judgment in question did not work a forfeiture of the policy under the sole and unconditional ownership clause.

From the foregoing, it follows that the verdict and judgment must be upheld.

No error.

STATE v. ERNEST BOSWELL.

(Filed 15 September, 1926.)

Criminal Law—Homicide—Evidence—Telegrams—Identification—Appeal and Error.

Where the defendant is on trial for homicide, and there is evidence tending to show that a certain person whose evidence was of paramount importance to him, was in a certain city of another state, a telegram to her, while he was out on bail, signed with his Christian name, reading, "Don't talk if you are under arrest. Will see you soon," requires further identification than that of the agent of the telegraph company that it had been received for transmission at his office on the date stated, to be admissible in evidence against him, and its admission over the defendant's exception is reversible error.

APPEAL by defendant from *Barnhill, J.,* at February Term, 1926, of WILSON.

Criminal prosecution tried upon an indictment in which it is charged that the defendant, Ernest Boswell, with two others, to wit: Arthur Lamm and Tanner Poythress, did on 7 February, 1925, kill and murder one Clayton Beaman of Wilson County.

Upon the call of the case for trial, the solicitor announced that, as Arthur Lamm had been convicted of murder in the second degree and Tanner Poythress acquitted at a former term of court, the State would not ask for a verdict of murder in the first degree against Ernest Boswell, but would ask for a verdict of murder in the second degree, or manslaughter, as the evidence might disclose.

Verdict: Guilty of murder in the second degree.

Judgment: Imprisonment in the State's prison for a period of not less than 20 nor more than 25 years.

Defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

O. P. Dickinson and A. O. Dickens for defendant.

STACY, C. J. There was ample evidence tending to connect Ernest Boswell with the murder of Clayton Beaman, and we need not consider the exception based on the motion to nonsuit, except to say that the demurrer to the evidence was properly overruled.

A woman by the name of Jennette Stewart was with the defendant on the night of the homicide, and she figured in the evidence, both of the State and the defendant, as Johnnie Stewart. She was evidently a concubine of the defendant.

On 29 April, 1925, more than two months after the homicide, and while the defendant was out on bail, having been arrested the second time, charged with the murder of Beaman, the following telegram was sent from Wilson, N. C., to Miss Jennette Stewart, care of police department, Americus, Georgia: "Don't talk if you are under arrest. Will see you soon. (Signed) Ernest."

The defendant admitted, on his cross-examination, that he was in Wilson in April, 1925, and that he knew Jennette Stewart was in Americus, Georgia, at that time, but stated that he did not send the telegram in question and knew nothing about it.

In rebuttal, the State offered J. S. Mallison as a witness, who testified that he was manager of the Wilson office of the Western Union Telegraph Company, that the telegram then shown to him (above set out) was the original taken from the files of his office, and that it was transmitted over the wires of the company. The message, including the name "Ernest," was all written with typewriter. Upon this identification, the telegram was offered in evidence and read to the jury.

The defendant contends that the State had laid no proper basis for the introduction of this telegram as evidence against him and that its reception as such was hurtful and prejudicial to his case. We are constrained to believe that the defendant's position in this regard is well taken.

In the first place, it will be observed, there is no evidence that the telegram was sent or signed by the defendant. That it was a pungent bit of evidence against him can hardly be doubted. The judge in arraying the contentions of the State called attention to the fact that the defendant had failed to have Jennette Stewart as a witness at the trial to corroborate him as to his whereabouts on the night of the homicide. It was con-

tended on the argument before the jury that Jennette Stewart knew more about the movements of the defendant on the night in question than he wished to have disclosed, and that for this reason he had sent her the above mentioned telegram. Its damaging effect, if incompetent, is apparent. The State's evidence is largely circumstantial in character. If the telegram in question were erroneously admitted, as contended by the defendant, a new trial must be awarded.

Ordinarily a letter, or a telegram, does not prove itself, and it is not admissible as evidence in the absence of proof of its genuineness. 25 A. & E. Enc. of Law, 876. Without such proof, there is nothing to show that it is not the act of a stranger or some other person. Any other rule would open wide the door to fraud and imposition. The question is so thoroughly discussed, with full citation of authorities, by *Walker, J.*, in *Woody v. Spruce Co.*, 175 N. C., 545, that we are content to rest our decision on what is said in that case without repeating it here. On the record, as now presented, the telegram in question should have been excluded. There is no sufficient evidence that it was authorized or sent by the defendant, or that he knew anything about it or had anything to do with it. If it were sent by a stranger without the knowledge or consent of the defendant, as suggested in appellant's brief, it certainly would not be competent as evidence in the present prosecution.

Nor was the error cured by submitting the question to the jury and instructing them to disregard the telegram unless they were satisfied of its genuineness, either that it was sent by the defendant personally or at his direction. The competency or admissibility of evidence, in this jurisdiction, is to be determined by the judge and not by the jury. *S. v. Whitener*, 191 N. C., 659.

There are other exceptions appearing on the record, worthy of consideration, but as they are not likely to arise on another hearing, we shall not consider them now.

For the error as indicated, there must be a new trial; and it is so ordered.

New trial.

J. F. BUCKMAN, JR., AND E. T. BUCKMAN v. S. C. BRAGAW, TRUSTEE ET AL.

(Filed 15 September, 1926.)

1. Mortgages—Deeds and Conveyances—Foreclosure Sales — Advertisement—Description—Warranty—Fraud.

Where the mortgagee or trustee has in good faith advertised the property foreclosed inaccurately as a certain number of feet frontage along a city street, in the absence of fraud or wilful misrepresentation, etc., the

purchaser may not offset the purchase price by the value of a shortage, in the absence of a warranty by deed of the quantity of land sold, and who has had equal opportunity with the seller under the power in the instrument of having ascertained the exact frontage of the *locus in quo*.

2. Same—Caveat Emptor.

The doctrine of caveat emptor applies to the sale of lands under foreclosure of a deed of trust.

CIVIL ACTION, before *Grady, J.*, at May Term, 1926, of BEAUFORT.

Prior to 15 May, 1920, C. M. Brown was the owner and in possession of a certain piece or parcel of land in the city of Washington, North Carolina, situated on the north side of Main Street and fronting on the north side of Main Street a distance of 49 feet. This land adjoined the lot of the defendant. On 15 May, 1920, Brown and wife executed to the defendant, S. C. Bragaw, a deed of trust on said land. Default having been made in the payment of the indebtedness described in said deed of trust, the said S. C. Bragaw, trustee, advertised and sold said property at public auction under and by virtue of the terms of said deed of trust, in September, 1924, at which time and place the plaintiffs became the last and highest bidders for the property for the sum of $27,000. The land was advertised by Bragaw, trustee, and described in said advertisement as fronting 49 feet on the north side of Main Street. Upon payment of the purchase money, Bragaw, trustee, executed to the plaintiffs a deed for said property in accordance with the description in said deed of trust and said advertisement, and described the property as fronting 49 feet on Main Street. After the purchase money had been paid by the plaintiffs they discovered that the land fronted only 46 feet on Main Street, and thereupon this suit to recover from Bragaw, trustee, the sum of $1,653 to cover the shortage of three feet in the dimensions of the lot conveyed. The purchase money had not been disbursed by the trustee and was held by him pending the outcome of the litigation.

Plaintiff testified that after the execution and delivery of deed from Bragaw, trustee, that he measured the property and found the shortage. There was further testimony to the effect that the plaintiff had known this property for twenty-five years or more.

At the conclusion of plaintiff's evidence the trial judge entered judgment of nonsuit, from which the plaintiffs appealed.

H. C. Carter for plaintiffs.

Small, MacLean & Rodman and Ward & Grimes for defendants.

BROGDEN, J. It was conceded that the plaintiffs cannot recover upon a breach of warranty.

The question therefore presented for solution is whether or not a purchaser at a trustee's sale of land under a deed of trust or a mortgage, can recover for a shortage of land in the absence of any representation made by the seller except such as may be contained in the advertisement or the deed of the trustee or mortgagee.

In *Smathers v. Gilmer,* 126 N. C., p. 759, the principles of law governing such cases are thus expressed: "The plaintiff had two opportunities for protection: 1. A simple calculation, according to the definite boundaries, courses and distances. 2. To require proper covenants in his deed for his protection.

Failing to avail himself of those means, he purchased at his own risk and subject to the principle of *caveat emptor.* When each party has equal means of information that principle applies, and the injured party is without remedy. If, however, false representations are made, on which the other party may reasonably rely, they constitute a material inducement to the contract, and the injured party has acted with ordinary prudence, courts of justice will afford relief. Ordinarily, the maxim of *caveat emptor* applies equally to sales of real and personal property, and will be adhered to where there is no fraud."

The lot of land in controversy was not sold by the foot or by the acre, and there can be, under the law of this State, no recovery for a shortage under such circumstances in the absence of any representation of fraud. *Turner v. Vann,* 171 N. C., 127; *Galloway v. Goolsby,* 176 N. C., 635; *Duffy v. Phipps,* 180 N. C., 313; *Lantz v. Howell,* 181 N. C., 401. The judgment must be

Affirmed.

FRANK H. SHORT ET AL. v. A. M. KALTMAN ET AL.

(Filed 15 September, 1926.)

1. Arrest and Bail—Negligence—"Recklessness"—"Wantonness."

The verdict of the jury in a negligence case that the recklessness of the driver of an automobile caused the injury of the plaintiff in a collision of the two cars, is alone insufficient for the court to grant plaintiff's motion for the issuance of an execution against the person of the defendant, there being no finding as to whether the act had been wantonly done.

2. Same—Evidence—Appeal and Error.

The verdict of the jury upon the issues submitted may be construed in the light of the pleadings and evidence, etc., but the pleadings as to "recklessness" and "wantonness" will not control the answer to the issue of "recklessness" as applied to negligence when on appeal it does not appear what was the evidence thereof introduced upon the trial.

SHORT *v.* KALTMAN.

APPEAL by plaintiff, Frank H. Short, from *Grady, J.*, at May Term, 1926, of BEAUFORT.

Civil actions—one for injury to the person, the other for damages to a car—instituted in the Superior Court of Beaufort County by Frank H. Short and McKeel-Richardson Hardware Company respectively, against A. M. Kaltman and Orris N. Brinkley. By consent the two cases were tried together, and resulted in the following verdict:

"1. Were the plaintiffs injured by the negligence of defendants, as alleged in the complaint? Answer: Yes.

"2. If so, what damage is the plaintiff, F. H. Short, entitled to recover for his personal injuries? Answer: $200.00.

"3. What damage is McKeel-Richardson Hardware Company entitled to recover for injury to its car? Answer: $150.00.

"4. Was the defendant, Brinkley, guilty of reckless driving at the time as alleged in the complaint? Answer: Yes."

The two suits arise out of a collision on the Tarboro-Rocky Mount public highway, between a Ford car driven by Frank H. Short and owned by his employer, McKeel-Richardson Hardware Company, and a Willis-Knight car, the property of A. M. Kaltman, and driven at the time by his employee, Orris N. Brinkley.

Each driver contended that the collision was due to the negligence of the other, and it is alleged in the complaint that the defendant, Brinkley, was driving in a reckless and wanton manner in disregard of plaintiff's rights at the time of the injury. The jury found that Brinkley was guilty of reckless driving as alleged in the complaint.

Upon the court's refusal to order that the defendant, Brinkley, be arrested and held to bail, or that execution be issued against his person, in case it were not satisfied out of his property, the plaintiff, Frank H. Short, excepted and appealed.

Small, MacLean & Rodman for plaintiff.
No counsel appearing for defendants.

STACY, C. J., after stating the case: The appeal presents the single question as to whether the plaintiff, Frank H. Short, on the instant record, is entitled to execution against the person of Orris N. Brinkley. We think not.

In the first place, it will be observed that in the complaint the words "reckless" and "wanton" are used conjunctively, which, when thus employed, convey the meaning of wilful misconduct or intentional wrong. *Bailey v. R. R.*, 149 N. C., 169. But in the issue submitted to the jury, the word "wanton" is omitted, and only the word "reckless" is used. The record discloses none of the evidence adduced on the hearing

nor the charge of the court to the jury, hence we are required to say whether or not the bare language of the 4th issue, *ex vi termini,* imports liability to arrest.

The word "reckless" has several meanings, and may vary in color and content according to the circumstances and the time in which it is used. *Towne v. Eisner,* 245 U. S., 418. In a mild sense, it means no more than careless, inattentive, or negligent, while as a harsher term, it may mean desperately heedless, wanton or wilful. *Pegram v. R. R.,* 139 N. C., 303; 4 Words & Phrases, 207.

It is a recognized principle with us that a verdict may be interpreted and allowed significance by proper reference to the pleadings, the evidence and the charge of the court. *Reynolds v. Express Co.,* 172 N. C., 491; *Sitterson v. Sitterson,* 191 N. C., 319; *Kannan v. Assad,* 182 N. C., 77. But here we are not advised as to what the evidence was, nor how it was presented to the jury. The trial court was of the opinion that the plaintiff was not entitled to an order of arrest and bail, or to an execution against the person of the defendant, Orris N. Brinkley. We cannot say, from the record as presented, that there was error in his ruling.

It has been held, in a number of decisions on the subject, that a mere negligent injury, without more, will not authorize an arrest and holding to bail, or an execution against the person. *Swain v. Oakey,* 190 N. C., 113; *Coble v. Medley,* 186 N. C., 479; *Weathers v. Baldwin,* 183 N. C., 276; *Oakley v. Lasater,* 172 N. C., 96.

The record is apparently free from error, hence the judgment, as entered, must be upheld.

No error.

J. A. WILKINSON ET AL. v. T. G. WALLACE.

(Filed 15 September, 1926.)

Courts—Decisions—Renewal—Vested Rights—Supreme Court.

A decision of the Supreme Court holding that it is necessary that a deed to lands be properly indexed for the purchaser to acquire title against a subsequent purchaser under a properly registered and indexed deed, will not affect the title acquired under a former decision of the Supreme Court holding to the contrary, and thus divest or impair the rights under the former decision of the Court thereon.

APPEAL by defendant from *Grady, J.,* at May Term, 1926, of BEAUFORT. Affirmed.

Small, MacLean & Rodman for plaintiffs.
Ward & Grimes for defendant.

ADAMS, J. This action was brought to determine an adverse claim to the plaintiffs' land and to quiet their title, and the controversy was submitted upon an agreed statement of facts. C. S., 626, 1743. On 16 March, 1852, the State issued a grant for this land to R. W. Harrison and the plaintiffs have exhibited an unbroken chain of *mesne* conveyances which are sufficient in form to transfer to themselves the title in fee simple. William H. Davis, one of the *mesne* grantees died intestate, leaving a widow, who after her second marriage was Josephine E. Wright, and one child whose name was Lillie G. Davis. On 15 August, 1887, Josephine E. Wright, who was then a widow, and Lillie G. Davis, the only heir at law, conveyed the land in controversy to W. J. Bullock by a deed which was recorded 8 September, 1887. The only index of this deed pointed to a conveyance from "Josephine E. Wright *et al.* to W. J. Bullock": there was no index or cross-index of any conveyance by Lillie G. Davis. Bullock conveyed the land to J. A. and W. S. Wilkinson 19 February, 1906, and on 28 January, 1914, these grantees conveyed it to the Pungo Deep Soil Development Company, one of the plaintiffs. Thereafter, that is, on 7 June, 1924, Lillie G. Davis executed a deed to Thos. G. Wallace, the defendant, purporting to convey the same land. This deed was registered 14 June, 1924, and the defendant claims to be the owner in fee on the ground that the conveyance from Josephine E. Wright and Lillie G. Davis to W. J. Bullock was defectively indexed by the register of deeds. Upon the facts set out in the record the trial court adjudged that the plaintiffs are the owners of the land in question and that the defendant's possession is wrongful and unlawful. The defendant excepted and appealed.

At the session of 1876-77 the General Assembly enacted a statute requiring the register of deeds to keep full and complete alphabetical indexes of deeds and other instruments, and afterwards made his failure to do so a misdemeanor. Code, 3664; Laws 1899, ch. 501; Rev., 2665, 3600; C. S., 3561. In 1894 the provision in reference to indexing the instruments referred to was construed to mean that the filing of a deed for registration was in itself constructive notice and that the register's failure to make a proper index of the conveyance did not impair its efficacy. *Davis v. Whitaker,* 114 N. C., 279. Approximately twenty-five years afterwards this decision was overruled and it was held that the indexing of deeds is an essential part of the registration. *Fowle v. Ham,* 176 N. C., 12; *Ely v. Norman,* 175 N. C., 294. The appeal presents the question whether these latter decisions are prospective or retroactive, and if prospective whether the decision in *Davis v. Whitaker* upholds and safeguards the plaintiffs' title.

As a rule, a decision of a court of supreme jurisdiction overruling a former decision is no doubt retrospective—"not that the overruled de-

cision was bad law, but that it never was the law." To this rule there is a recognized and approved exception. It is this: "Where a constitutional or statute law has received a given construction by the courts of last resort, and contracts have been made and rights acquired under and in accordance with such construction, such contracts may not be invalidated nor vested rights acquired under them impaired by a change of construction made by a subsequent decision." *Mfg. Co. v. Hester*, 177 N. C., 609; *Fowle v. Ham*, 176 N. C., 12; *Ely v. Norman*, 175 N. C., 294; *Jones v. Williams*, 155 N. C., 179, 190; *Mason v. Cotton Co.*, 148 N. C., 492, 510; *Hill v. Brown*, 144 N. C., 117; *Hill v. R. R.*, 143 N. C., 539, 573.

The defendant, admitting that the plaintiffs' position would be strong if Bullock had acquired his title after the decision in *Davis v. Whitaker, supra,* and before the decision in *Fowle v. Ham, supra,* differentiates Bullock's position from that of Fowle and makes the point that until *Davis' case* was decided the plain language of the statute was controlling, and in effect that Bullock's status was that of a grantee in an unregistered deed. This position, in our opinion, cannot be maintained. In the *Davis case* the Court said in substance that the office of the index was to serve the convenience of those who had occasion to search the records and not to protect the party who recorded his conveyance; that the filing with the register of deeds of an instrument requiring record had the effect of registration; and that the statute directing that such instruments be indexed did not have the effect of repealing the existing law. Under the law as it then existed Bullock's delivery of his deed to the register was, for the purpose of constructive notice, tantamount to registration. *McKinnon v. McLean*, 19 N. C., 79; *Metts v. Bright*, 20 N. C., 311; *Parker v. Scott*, 64 N. C., 118. See, also, *Glanton v. Jacobs*, 117 N. C., 427, 429. If these decisions were not affected by the statute in reference to indexing, as held in *Davis v. Whitaker, supra,* and if this construction became a part of the statute itself, as held in *S. v. Fulton*, 149 N. C., 485, 487, it follows that such interpretation was a judicial declaration of the purpose, scope, and effect of the statute as it was intended to be understood when it was enacted by the Legislature, and that the title Bullock acquired in 1887 under the "existing law" was in no respect impaired by the register's failure properly to index the purchaser's deed.

We have gone very carefully into the defendant's brief but have found no convincing authority inconsistent with the conclusion herein announced. The judgment is

Affirmed.

MARY E. COMMANDER v. N. HOWARD SMITH.

(Filed 15 September, 1926.)

Contracts—Breach—Evidence—Market Quotations—Telegrams.

The price of a commodity as per the market quotation on the New York Exchange generally relied on by dealers therein, may be shown by telegrams and quotations thus received by a dealer local to the transaction, and the testimony of such dealer is competent evidence upon the trial.

APPEAL by plaintiff from *Grady, J.*, at January Term, 1926, of PASQUOTANK. Reversed.

J. C. Brooks and Aydlett & Simpson for plaintiff.
Thompson & Wilson for defendant.

ADAMS, J. This was an action to recover damages for a breach of contract. The plaintiff's evidence tended to show that on 1 June, 1924, she delivered to the defendant at his request ninety-three baskets of peas for shipment on that day to "whatever market he thought best"; that the defendant contracted to ship the peas on the day they were delivered; that he failed to do so, but turned them over to another for transportation and thereby delayed their delivery on the New York market for at least two days; and that owing to fluctuation in the market during this time the price declined and the plaintiff suffered loss.

It became necessary to establish the price in the New York market on each of these dates. On this point W. H. Jennette, who made the shipment, testified on his direct examination substantially as follows: "I know what the market was on Thursday morning according to the telegrams. We received telegrams every day from the New York market. I got telegrams for peas that were sold that day. I have the telegrams with me. This is the telegram received from salesman there. I got returns for peas sold on Thursday from New York. The price was $3.75 to $4.00. From telegrams and sales in New York the price on Saturday was $1.50 to $3.20." The telegrams were admitted in evidence, but they do not appear in the record.

On cross-examination he said that by reference to his papers he could give the time of shipment and the market price in New York at the dates in question. He made other statements which, it was suggested, are not altogether consistent with his direct testimony, but it is not necessary specifically to point them out. At the conclusion of the evidence the defendant renewed his motion for nonsuit, and the evidence of Jennette with respect to the market value of the peas was withdrawn from the jury and the motion was allowed. The plaintiff excepted and appealed.

The argument here was addressed to the question whether, conceding the execution of the contract and its breach by the defendant, there was sufficient evidence of the plaintiff's loss. It is argued on behalf of the defendant that Jennette's testimony as to the New York market is not only incompetent but insufficient even if competent, and that the court properly withdrew it from the jury.

In reference to land the approved definition of market value is given in *Brown v. Power Co.*, 140 N. C., 333. But the market value of personal property which is regularly sold in the open market as an ordinary commodity has been defined as the price established by public sales conducted in the way of a business, or such prices as dealers in the articles are willing to receive and purchasers are made to pay, when the goods are bought and sold in the ordinary course of trade; and as a rule standard price lists and market reports which are shown to be in general circulation and relied on by the commercial world and by those engaged in the trade may be received as evidence of the market value. *Ferebee v. Berry*, 168 N. C., 281; *Moseley v. Johnson*, 144 N. C., 257; 22 C. J., 186 (147), 188, 929 (1135); *R. R. v. Pearce* (Ark.), 12 An. Cas., 125 and annotation; *McGilvra v. R. R.* (N. D.), 159 N. W., 854; *Packing Co. v. Griffith* (Tex.), 144 S. W., 1139; *Mount Vernon Co. v. Teschner* (Md.), 16 L. R. A. (N. S.), 758 and annotation; 3 Jones, Com. on Ev., sec. 582. This broadly stated is a general rule; but evidence of market value is not confined to price lists and market reports. In *Smith v. R. R.*, 68 N. C., 107, it was held that telegrams, circulars, and correspondence were admissible on the ground, not that a single sale was sufficient, but that evidence of the aggregate sales of a day or a period, embodied in a reputation among dealers in the article, was competent evidence; and in *Suttle v. Falls*, 98 N. C., 393, the Court sustained evidence of the market value of mica given by a witness who had obtained his information in the course of his trade from general dealers in mica who transacted their business at the place of sale. See, also, *Brackett v. Edgerton* (Minn.), 100 Am. Dec., 211. On the other hand the testimony of a witness who derives his information from reports in a single newspaper published in a city remote from the place of sale is not sufficient. *Fairley v. Smith*, 87 N. C., 367.

As was said in the case last cited, evidence of the market value of an article sold in the open market of a distant city should be sufficient prima facie to show the accuracy of the published information as to the state of the distant market. Tested by this principle the excluded evidence, we think, should have been submitted to the jury. Parts of this evidence, it is true, are obscure and unsatisfactory; but it tends to disclose the receipt of telegrams sent to the witness every day from the New York market, telegrams and sales on Wednesday and on Satur-

day, and other relevant circumstances. Whether the telegrams from the market were in fact those sent by the salesman we are unable to determine from the evidence. No doubt a full disclosure will make this plain. We are of opinion that on the present record we are precluded from holding as a matter of law that Jennette's evidence is altogether insufficient as to the value of the peas on the New York market.

The judgment of nonsuit is reversed and a new trial awarded.

Reversed.

J. H. HART ET AL. v. BOARD OF COMMISSIONERS OF BURKE COUNTY.

(Filed 15 September, 1926.)

1. **Taxation—Constitutional Law—Statutes—Revenue—Machinery Act—County Commissioners—Revaluation of Property.**

A statute that provides for the revaluation and equalization of the value of property by the county commissioners, to be levied in accordance with an existing constitutional statute, is not in its strict sense a revenue law requiring the separate readings before each branch of the Legislature upon the separate days, etc., prescribed by Art. II, sec. 14, of the State Constitution, but is in the nature of a machinery act, which does not fall within this constitutional requirement.

2. **Taxation—Constitutional Law—Classification of Property—Uniformity.**

Under the provisions of a statute authorizing the county commissioners to reassess, revalue and equalize property therein for the purpose of taxation, the determination of the commissioners thereunder is not objectionable as not being uniform when the assessment of each class of property is uniform within its own proper classification.

3. **Taxation—Counties—Assessment — Revaluation — Notice — Constitutional Law.**

Where a statute authorizes a county through its commissioners to revalue and reassess the property therein for taxation, and accordingly the board fixes a time therefor and adjourns for the purpose of having formulated the necessary information upon which they should act, and notice of the time for the taxpayers to be heard has been incorrectly published in a newspaper, and verbally at a certain day of the week and month, and correction likewise made sufficient to apprise the taxpayers in time to appear before the board and be heard: *Held*, the proceedings of the commissioners will not be declared invalid by reason of such error.

4. **Taxation—Counties—Statutes—Remedies—Appeal—Courts.**

Where the property owner is given sufficient notice to appear before the board of county commissioners and object to the valuation placed on his property for taxation, and fails to do so and pursue his remedy by appeal in accordance with the remedy prescribed by the statute applicable, he may not by independent action proceed in our courts to object to the valuation on his property fixed by the commissioners.

CIVIL ACTION, heard by *Webb, J.*, at March Term, 1926, of BURKE.

The facts necessary to the presentation of the merits of the controversy are set out in the judgment, which is as follows:

"The above-entitled action coming on for hearing, and being heard upon the pleadings and the affidavits offered by plaintiffs and defendants, the court finds as a fact that chapter 545 of the Public-Local Laws of North Carolina of 1925, ratified 9 March, 1925, was not read on three separate days in each House, and that the yeas and nays on the second and third readings were not entered on the journal, and being of the opinion upon inspection and consideration of said statute that the same merely provides for a revaluation and assessment of property in Burke County during the year 1925, and that the same, therefore, was not required to be enacted in accordance with the provision of section 14, Article II of the Constitution; the court is further of the opinion that the said statute is in all respects legal, valid and binding and in no way in conflict with the Constitution.

The court further finds as a fact that under the authority given and conferred on them by said statute and in the exercise of the discretion thereby conferred upon them the defendant, board of commissioners of Burke, entered an order for and caused a revaluation and assessment of all property to be made in Burke County during the year 1925, the same not being completed until the latter part of the summer of 1925, and that after the same had been completed the said defendant, board of commissioners of Burke County, sat as a county board of equalization, and heard complaints of the citizens of Burke County in regard to valuation and assessment, in some instances reducing them and in other instances increasing the valuation placed on said property by the tax listers and assessors.

The court further finds as a fact that the work of the tax lister and assessors not having been fully completed by the second Monday in July, the consideration of all complaints was deferred by the defendant, board of commissioners, until the assessments had been completed, and that on 22 September, 1925, when the defendant, board of commissioners finally sat as a county board of equalization for the purpose of hearing complaints of the citizens as to the valuations placed upon their property by the tax listers and assessors, and that in addition to verbal notices generally given by said board the following written notices were given of the time when complaints would be heard, the same being published in the *News-Herald*, a newspaper published in Morganton, Burke County. In the weekly publication or issue of 10 September, 1925, the following notice:

"'Monday, 21 September, for hearing tax complaints. The county commissioners have set aside Monday, 21 September, as the time for hearing tax complaints.'

"And the said newspaper in its issue of 16 September, 1925, contained the following notice:

" 'Tuesday, the 22nd, is the day for tax complaints. Attention is called to the fact that Tuesday, 22 September, is the date set by the county commissioners for hearing tax complaints. By error, it was given in last week's paper as Monday, 21st.'

"The court finds as a fact that no notice was given to the plaintiffs of the notice of 22 September, 1925, other than the notice published in the paper.

"The court further finds as a fact many of the citizens of the county of Burke appeared before the county board of commissioners on 22 September, 1925, sitting as a board of equalization, made complaints as to the valuation of their property which were heard and passed upon by said board, and some appeals taken from their ruling, and that at frequent intervals since that date complaints have been made to the defendant board by the citizens of said county of the valuation placed upon their property, and that the defendant board is still attempting to obtain evidence and ascertain whether any real property in said county has been valued too high and correct any errors or mistaken valuation placed thereon and remedy and remove such injustice, if any, done any taxpayers of said county.

"The court further finds that in the revaluation and assessment made by the tax listers and assessors there is probable cause to believe that mistakes and errors have been made and committed in ascertaining the value of real estate owned by some of the citizens of Burke County, such errors and mistakes being common and unavoidable in all assessments, but the court is of the opinion that the statutes of this State point out and prescribe the remedy and the method which must be pursued in order to correct or cure such errors and mistakes in assessments, and the court is of the opinion that it should not restrain the collection of the taxes in Burke County by reason of such errors and mistakes in the valuation or assessments in individual cases, and that the plaintiffs herein or any one of said plaintiffs should pursue the remedy pointed out by the statutes and the decisions of the Supreme Court.

"It is, therefore, considered, ordered and adjudged by the court that the restraining order applied for be, and the same is hereby denied, and that this action be, and the same is hereby dismissed, and that the plaintiffs and the sureties on their prosecution bond pay the cost of this action to be taxed by the clerk of the court."

Avery & Patton, Huffman & Cowan for plaintiff.

Avery & Hairfield, S. J. Ervin and S. J. Ervin, Jr., for defendant.

BROGDEN, J. Chapter 545, Public-Local Laws of 1925, authorizes the board of commissioners of Burke County in their discretion "to cause a revaluation and assessment to be made of all the real estate and personal property in Burke County liable for taxation, in the manner provided in chapter 12, Public Laws 1923, and to levy taxes thereon based upon such revaluation and assessment . . . as now provided by law."

The controversy between the parties arises from the construction of this act of the Legislature. The plaintiffs contend: First, That said act is a revenue act, and therefore under Article II, sec. 14, of the Constitution, the act should have been "read three several times in each House of the General Assembly and passed three several readings, which readings shall have been on three different days, and agreed to by each House respectively, and the yeas and nays on the second and third readings of the bill entered on the journal; second, that the defendants adopted a nonuniform method of making valuations and assessments; third, that no proper notice was given by the board of equalization of its meeting to equalize the assessments made under the act referred to.

Article II, sec. 14, of the Constitution, establishes the method by which revenue bills must be passed by the Legislature. But the question standing at the threshold of this aspect of the case is whether or not the act in question is, as a matter of fact, a revenue bill. "Revenue bills, as defined by law, are those that levy taxes in the strict sense of the word and are not bills for other purposes which may incidentally create revenue." 1 Story Constitution, sec. 880; *Twin City National Bank v. Nebeker,* 167 U. S., 196; 42 L. Ed., 134; *Millard v. Roberts,* 202 U. S., 429; 50 L. Ed., 1090; *Anderson v. Ritterbusch,* 98 Pac., 1002; 26 R. C. L., sec. 55; *Northern Counties Investment Trust v. Sears,* 35 L. R. A. (O. S.).

In the *Anderson case, supra,* the act under consideration was "An act for the discovery of property not listed for taxation, providing for its assessment and collection of taxes thereon." The Court held that this was not a bill for raising revenue, placing its decision upon the principle announced by *Judge Story.* Indeed, an examination of the act discloses that it was obviously designed to authorize the revaluation of property in Burke County, and expressly provided that taxes should be levied "as now provided by law." Therefore, the act was not a revenue bill, but in the nature of a machinery act, and hence did not require compliance with Article II, sec. 14, of the Constitution.

The second contention of the defendant is based upon the idea that there were inequalities in the assessment of property. "It has been said that perfect uniformity and perfect equality of taxation, in all the

aspects in which the human mind can view it, is a baseless dream. With reference to locality, a tax is uniform when it operates with equal force and effect in every place where the subject of it is found, and with reference to classification, it is uniform when it operates without distinction or discrimination upon all persons composing the described class." *R. R. v. Lacy,* 187 N. C., 615; *Edge v. Robertson,* 112 U. S., 580; 28 L. Ed., 798; Cooley on Taxation, ch. 6; *Lacy v. Packing Co.,* 134 N. C., 567; *S. v. Denson,* 189 N. C., 173.

However, the law in its wisdom has created tribunals to equalize values and to correct inequalities, to wit, county boards of equalization and the State Board of Assessment.

The third contention of the plaintiff raises the question as to whether proper notice was given by the board of equalization. It is a sound and just principle of law and one worthy of acceptation that "absence of notice or opportunity to be heard, violates the due process of law provision." *Lumber Co. v. Smith,* 146 N. C., 199; *Markham v. Carver,* 188 N. C., 615. The trial judge found as a fact that the board of commissioners of Burke County met as a board of equalization on the second Monday in July as required by law, and finding that the assessors had not completed the work assigned, deferred consideration of all complaints, and set 22 September, 1925, as the time for hearing complaints of citizens as to the valuation placed upon their property, and that, in addition to verbal notice generally given by said board, the following written notices were given of the time when complaints would be heard, same being published in the *News-Herald,* a newspaper published in Morganton, Burke County, in the weekly publication or issue of 10 September, 1925: "Monday, 21 September, hearing tax complaints. The county commissioners have set aside Monday, 21 September, as the time for hearing tax complaints," and the said newspaper in its issue on 16 September, 1925, contained the following notice: "Tuesday, the 22nd, is the day for tax complaints. Attention is called to the fact that Tuesday, 22 September, is the date set by the county commissioners for hearing tax complaints. By error, it was given in last week's paper as Monday, the 21st."

Chapter 12, Public Laws of 1923, sec. 70, provides for "notice in one newspaper, or by poster put up," etc. The law is that the board of equalization must meet on the second Monday of July and continue until the work of revision is completed; that it must fix a time for hearing of complaints, and that notice of such hearing must be given. *Comrs. v. R. R.,* 86 N. C., 541; *Wolfenden v. Comrs.,* 152 N. C., 84; *Markham v. Carver,* 188 N. C., 615. After the board has completed its work of revision it cannot thereafter increase valuation without special notice to the taxpayers. *Wolfenden v. Comrs.,* 152 N. C., 84; *Markham v. Carver,* 188 N. C., 615.

This record discloses that the board of equalization could not complete its work at the July meeting because the assessors had not completed the work of assessing property in Burke County. It was therefore the duty of the board to adjourn until this preliminary work could be completed. This the board did. It was also the duty of the board to give reasonable notice of the time set for hearing complaints of property owners. The board performed this duty in a substantial manner.

The plaintiffs did not appeal from the assessments made by the board of equalization of Burke County. It is a generally accepted principle of law that in cases of this sort a taxpayer is not allowed to resort to the courts until he has first pursued and exhausted the remedies before the administrative boards established by law for such purposes. Thus in *Mfg. Co. v. Comrs.*, 189 N. C., 103, *Hoke, C. J.*, says: "From a consideration of these and other pertinent provisions of the law, it is clear, in our opinion, that the State Board of Assessment is given supervisory powers to correct improper assessments on the part of the local boards, and that on complaint made in apt time and on notice duly given and on sufficient and proper proof before this State board, plaintiff could have obtained or had full opportunity to obtain the relief he now seeks. This being true, the judgment of his Honor sustaining the demurrer must be upheld, for it is the accepted position that a taxpayer is not allowed to resort to the courts in cases of this character until he has pursued and exhausted the remedies provided before the duly constituted administrative boards having such matters in charge."

We must hold, therefore, that the judgment as rendered be

Affirmed.

M. P. HITE v. A. L. AYDLETT.

(Filed 15 September, 1926.)

1. Contracts—Written Instruments—Parol Evidence—Architects.

Where the owner has accepted the written proposition of an architect to prepare plans and specifications for the erection of a building on his lands, which the architect has accordingly done, and nothing has been specified in the writing as to the cost of the building contemplated, parol evidence which tends to show that the parties had agreed that the building was not to exceed a certain amount in its construction is not a contradiction of the written agreement, and it is competent for the owner to show in defense of the architect's action to recover for his services thus rendered, that the entire contract was not reduced to writing, and that the cost of the building exceeded the amount agreed upon.

2. Same—Evidence—Reference to Other Writings.

A "hand-book" relating to the subject-matter of a contract between the owner and the architect for the contemplated erection of a building on the former's land, is competent evidence when relevant to the inquiry in the action of the architect to recover for his services rendered, when expressly referred to in the written agreement between them and made a part thereof.

3. Contracts—Breach—Damages—Architect.

Where the owner enters into a contract with an architect for the latter's furnishing plans and specifications for a building upon a percentage of the cost of the erection of the building, as a part of his compensation, he may recover the same in his action when the owner has wrongfully prevented his fulfillment of his contract.

APPEAL by defendant from *Grady, J.*, at June Term, 1926, of PASQUOTANK. New trial.

Civil action to recover for services rendered to defendant by plaintiff as an architect, pursuant to contract in writing. A proposal, dated 24 July, 1924, signed by plaintiff and accepted by defendant, in writing, on 7 August, 1924, comprises the entire contract, as alleged by plaintiff. Defendant admits acceptance by him of plaintiff's proposal, but alleges that said proposal does not contain the entire contract between plaintiff and himself. He alleges that it was understood and agreed that the plans and specifications for remodeling his building should be so drawn by plaintiff that the total cost of construction should not exceed $17,000; that this provision was omitted from the written contract by the mutual mistake of the parties; that the lowest bid secured for the work to be done in accordance with the plans and specifications furnished by plaintiff was in excess of $22,000, and that he declined to accept said plans and specifications as furnished by plaintiff, for contract, for the reason that same were not in accordance with the contract. No work has been done on defendant's building as contemplated in the contract between plaintiff and defendant.

The issues submitted by the court were as follows:

1. Was it understood and agreed between plaintiff and defendant that the total cost of the work referred to in the contract of 24 July, 1924, was not to exceed $17,000? Answer: .....

2. If so, was such agreement left out of said contract by the mutual mistake of the parties, as alleged in the answer? Answer: .....

3. In what amount is the defendant indebted to the plaintiff? Answer: .....

At the close of the evidence, the court charged the jury as follows:

"I charge you that if you find the facts to be as testified to by all the witnesses in this case, you will answer the first issue, 'No.'

"You need not answer the second issue, and you will answer the third issue, '$670.56.'"

Defendant duly excepted to the instructions contained in the charge to the jury.

The jury answered the first issue, "No"; did not answer the second issue, and answered the third issue, "$670.56." Defendant excepted to the judgment rendered upon the verdict and appealed therefrom to the Supreme Court.

Thompson & Wilson for plaintiff.
Aydlett & Simpson for defendant.

CONNOR, J. The defense relied upon by defendant to plaintiff's recovery upon the cause of action set out in the complaint, is that plaintiff has not performed his contract with defendant, in that he has failed to furnish plans and specifications for the work contemplated in accordance with the contract. Defendant alleges that it was expressly understood and agreed that the plans and specifications to be furnished by plaintiff should be so drawn and prepared that the cost of construction in accordance therewith should not exceed $17,000, whereas the lowest bid submitted for the work in accordance with the plans and specifications as furnished by plaintiff exceeded $22,000.

The contract in writing, between plaintiff and defendant, consisting of the proposal and acceptance, does not provide that the cost of construction in accordance with the plans and specifications which the plaintiff agreed to furnish should not exceed the sum of $17,000—indeed, there is no reference in the written contract to any sum as the maximum cost of the work contemplated. The proposal contains the following clause:

"The construction work contemplated shall be as approximately outlined in the preliminary sketches and comprise remodeling the present house with the necessary additions."

Defendant agreed, by his acceptance of plaintiff's proposal, to pay to plaintiff for his services in acting as defendant's adviser, in furnishing plans and specifications for the work contemplated, in drawing the contract, and in supervising generally the construction of a block of six stores to replace the present first floor and two apartments to occupy the second floor of defendant's present residence, corner Road and Main streets, Elizabeth City, N. C., five per cent of the construction cost of said building.

There was evidence to the effect that prior to defendant's acceptance of plaintiff's proposal, as a result of negotiations between them, plaintiff prepared and submitted to defendant preliminary sketches of the

work contemplated, and that after full discussion plaintiff estimated that the cost of construction in accordance with said preliminary sketches would not exceed $17,000; that defendant informed plaintiff that he would not undertake the remodeling of his building unless the work could be done for a sum not in excess of $17,000; that plaintiff made and submitted figures with the preliminary sketch showing that the cost would not exceed this sum; that after the plans and specifications had been prepared and submitted to defendant by plaintiff, plaintiff assured defendant that the work could be done in accordance with said plans for a sum not in excess of $17,000; that thereupon, by means of advertisements, bids were sought for said building in accordance with said plans and specifications as furnished by plaintiff; that the lowest bid secured for said work exceeded the sum of $22,000; that this bid was rejected by plaintiff, acting for defendant, and that thereupon defendant refused to accept said plans and specifications and declined to proceed further with said work.

There was evidence from which the jury could have found that the entire contract between plaintiff and defendant was not contained in the written proposal and acceptance. The terms of the contract, which defendant contended were not included in the proposal and acceptance, and which the parol evidence tended to establish, do not contradict, vary or add to the terms of the contract as contained in the writing. If, therefore, the jury shall find that the entire contract was not in writing, defendant may by parol evidence establish the terms of said contract, which were not included in the proposal and acceptance.

The plans and specifications which plaintiff proposed, in writing, to furnish for remodeling defendant's building are not definitely and specifically described; the said proposal leaves it doubtful or uncertain as to what the plans and specifications should provide with respect to the building; it is provided that the construction work contemplated shall be approximately as outlined in the preliminary sketches which had been submitted to defendant by plaintiff. Defendant may therefore show by parol evidence what the agreement was with respect to said plans and specifications. If plaintiff agreed to furnish plans and specifications for work which would not cost to exceed $17,000, defendant may show this agreement, not to contradict, vary or add to the terms contained in the written contract, but to make certain what plans and specifications plaintiff agreed to furnish in order that the jury may find whether those furnished were in compliance with the contract.

"We have no disposition to modify or disregard the settled rules, intended for the 'protection of the provident,' and not for 'the relief of the negligent,' which prohibit the admission of parol evidence to

contradict, add to or vary the terms of a written contract, even where a part of a contract is in writing and a part is in parol, *Moffitt v. Maness,* 102 N. C., 457; but we must adhere to the long line of decisions which hold that where the contract is not one which the law requires to be in writing, and a part is written and a part is not, evidence of the unwritten part, if it does not contradict the writing, is admissible for the purpose of establishing the contract in its entirety. *Twidy v. Saunderson,* 31 N. C., 5; *Manning v. Jones,* 44 N. C., 368; *Daughtry v. Boothe,* 49 N. C., 87; *Braswell v. Pope,* 82 N. C., 57; *Cumming v. Barber,* 99 N. C., 332; *Palmer v. Lowder,* 167 N. C., 333." *Adams, J.,* in *Henderson v. Forrest,* 184 N. C., 230.

"It is a well-established general rule that if the parties reduce their entire contract or agreement to writing, whether under seal or not, the court will not hear parol evidence to vary or change it, unless for fraud, mistake or the like; but if it appear that the entire agreement was not reduced to writing, or if the writing itself leaves it doubtful or uncertain as to what the agreement was, parol evidence is competent, not to contradict, but to show and make certain what was the real agreement between the parties; and in such a case what was meant, is for the jury, under proper instructions from the court." *Davis, J.,* in *Cumming v. Barber,* 99 N. C., 332.

We must hold that the instruction of the court to the jury upon the first issue was erroneous. The assignment of error based upon said exception is sustained.

It may be conceded that there is no evidence from which the jury could have found that the agreement with respect to the maximum cost of the building was omitted by mutual mistake of the parties; defendant's defense, however, is not dependent upon the reformation of the written contract as prayed by him. Plaintiff cannot recover in this action unless the jury shall find that he performed his contract with defendant by furnishing plans and specifications in accordance with his contract. If plaintiff agreed to furnish plans and specifications for remodeling defendant's residence as outlined in the preliminary sketches at a cost not to exceed $17,000, and the cost of doing the work in accordance with the plans and specifications prepared by plaintiff, will exceed the sum of $22,000, plaintiff cannot recover, for he has failed to perform his contract. It is not contended that plaintiff as architect guaranteed that the cost of construction would not exceed $17,000, but that he agreed to furnish plans and specifications in accordance with which the building could be done at a cost not to exceed the sum of $17,000, and that he has failed to furnish such plans and specifications. See *Feltham v. Sharp* (Ga.), 25 S. E., 619.

The exception to the introduction as evidence of a copy of the Kidder-Nolan Handbook, 17th edition, cannot be sustained. It is expressly provided in the contract that this handbook shall be authoritative on any question arising under the contract. If plaintiff has performed his contract with respect to the plans and specifications, and the work was abandoned by defendant, through no fault of plaintiff, plaintiff is entitled to recover, under the contract, a sum equal to 60 per cent of the reasonable cost of doing the work in accordance with the plans and specifications furnished in compliance with the contract.

For the error in the instruction upon the first issue, there must be a New trial.

THE CORLEY COMPANY, INC., v. A. S. GRIGGS AND WIFE, MRS. MINNIE GRIGGS.

(Filed 15 September, 1926.)

Contracts—Rescission—Fraud—Deceit— Evidence — Presumptions — Instructions—Scienter—Appeal and Error.

Where fraud or deceit is set up as a defense in an action to rescind a contract for the purchase of a piano from a dealer, in the seller's action to recover the purchase price, it is required that the defendant show that the plaintiff or his sales agent knew that the false representations relied on were knowingly or recklessly made to the defendant, that they were relied on by him, and reasonably induced him, without knowledge of their falsity to enter into the contract sued on, and an instruction to the jury that leaves out the principle relating to plaintiff's scienter under these circumstances, is reversible error, to the plaintiff's prejudice.

APPEAL by plaintiff from *Grady, J.*, and a jury, at April Term, 1926, of CURRITUCK. New trial.

This was an action brought by plaintiff against the defendants for the recovery of $450, with interest, from 1 September, 1922, the price of a Schubert piano, sold and delivered to the defendants. The alleged contract of sale was admitted by defendants, but they set up the defense: "That the defendants were induced to enter into the said contract by the false and fraudulent misrepresentations of the said plaintiff, in that it was represented to them by plaintiff's agent, Butler, that the said piano which the said defendants were buying was a new one, was up-to-date in every respect; that it would play satisfactorily; that it would give the defendants satisfaction in every respect, when in fact the said piano was not a new one, but was a

second-hand, or used, piano; that it was defective in workmanship, and in the mechanical parts, all of which was well known to the plaintiff's agent when he made these representations to the defendants, and the said representations were made with the knowledge of their falsity and with the intention to deceive, calculated to deceive and did deceive these defendants to their injury, and by reason of the same the defendants were caused to enter into the said contract." That the representations were false. That immediately upon the discovery of the false representations made by plaintiff's agent to them they notified plaintiff to remove the piano.

In reply plaintiff denied that the defendants were induced to enter into the contract by any false or fraudulent representation of plaintiff or its agent. It denied that the piano was a used or second-hand one. It denied all the other allegations as to defective workmanship, etc. Denied that any wrong had been committed in the sale and alleged that defendants had used and operated the piano for more than two years.

The issues submitted to the jury and their answers thereto were as follows:

"1. Was the execution of the contract in question procured by false and fraudulent representations as alleged in the answer? Answer: Yes.

2. In what amount, if anything, are defendants indebted to the plaintiffs? Answer: ....."

The evidence on the trial bore out the contentions of the respective parties.

The material assignment of error will be considered in the opinion.

McMullan & Leroy for plaintiff.
Aydlett & Simpson for defendants.

CLARKSON, J. The defendants set up actionable fraud or deceit to rescind the alleged contract. The only serious contention or assignment of error of plaintiff (4) is that the court below in its charge omits any reference to scienter.

The charge complained of was as follows: "It is necessary for them to show to you by the greater weight of the evidence before you can answer the issue in their favor, first, that such representations were made to them by Mr. Butler, and second, that these representations were false; third, that they relied upon these representations as being true; fourth, relying upon them to be true they purchased the instrument and executed the contract."

In *Whitehurst v. Ins. Co.*, 149 N. C., p. 276, the Court says: "And it is not always required, for the establishment of actionable fraud, that a false representation should be knowingly made. It is well recognized with us that, under certain conditions and circumstances, if a party to a bargain avers the existence of a material fact recklessly, or affirms its existence positively, when he is consciously ignorant whether it be true or false, he may be held responsible for a falsehood; and this doctrine is especially applicable when the parties to a bargain are not upon equal terms with reference to the representation, the one, for instance, being under a duty to investigate, and in a position to know the truth, and the other relying and having reasonable ground to rely upon the statements as importing verity. *Modlin v. R. R.*, 145 N. C., 218; *Ramsey v. Wallace*, 100 N. C., 75; *Cooper v. Schlesinger*, 111 U. S., 148; Pollock on Torts, 7 ed., 276; Smith on the Law of Fraud, sec. 3; Kerr on Fraud and Mistake, 68." *Unitype Co. v. Ashcraft*, 155 N. C., p. 63; *Machine Co. v. McKay*, 161 N. C., p. 584; *Simpson v. Tobacco Growers*, 190 N. C., 603; *Dunbar v. Tobacco Growers*, 190 N. C., 608; *McNair v. Finance Co.*, 191 N. C., 710.

In Pollock on the Law of Torts (1923), 12 ed., p. 283-4, the rule is well stated: "To create a right of action for deceit there must be a statement made by the defendant, or for which he is answerable as principal, and with regard to that statement all the following conditions must occur: (a) It is untrue in fact. (b) The person making the statement, or the person responsible for it, either knows it to be untrue, or is culpably ignorant (that is, recklessly and consciously ignorant) whether it be true or not. (c) It is made to the intent that the plaintiff shall act upon it, or in a manner apparently fitted to induce him to act upon it. (d) The plaintiff does act in reliance on the statement in the manner contemplated or manifestly probable, and thereby suffers damage."

In some cases the scienter is presumed from the transaction where the seller was the inventor. *Unitype Co. v. Ashcraft, supra.* Where the seller was the manufacturer of the article. *Peebles v. Guano Co.*, 77 N. C., p. 233.

In the *Unitype Co. case, supra*, p. 67, the Court says: "It appears in this case that the false statements were made by the inventor of the machine, who must be supposed to have been fully informed as to its good and bad qualities and who must, therefore, have made the representations knowing them to be false. It was so expressly held in *Peebles v. Guano Co.*, 77 N. C., 233. The plaintiff in this case is a corporation and the manufacturer of the machine, and therefore what is said in the *Peebles case* is clearly pertinent to the facts as

presented in the record: 'It is said that the jury have not found that the representations were fraudulent, but only that they were false, and without fraud, the action cannot be maintained. If we consider the action as for the deceit, this objection would be unanswerable if the defendant was the seller only, and not also the manufacturer of the article. It is difficult to conceive how a manufacturer of guano can make a representation concerning the substance of which it is composed, which is false, and not also fraudulent, in the sense that it was knowingly false. If his servants employed in the manufacture, on any occasion by negligence, or wilfully, omitted to put in the valuable ingredients without the knowledge or connivance of the manufacturer, it would free his false representation from immorality, but he must in law be held equally liable for the acts of his servants, and he cannot be held innocent of a moral fraud, if after being informed of the omission he seeks to take advantage of it by demanding for a spurious and worthless article the price of the genuine one. We think that on the facts found by the jury the plaintiff was entitled to damages.'"

In Pollock, *supra,* p. 289, it is said: "The Supreme Court of the United States said (in *Lehigh Zinc and Iron Co. v. Bamford* (1893), 150 U. S., 665, 673), that 'a person who makes representations of material facts, assuming or intending to convey the impression that he has adequate knowledge of the existence of such facts, when he is conscious that he has no such knowledge,' is answerable as if he actually knew them to be false—which is admitted everywhere—and then went on to say that vendor or lessor may be held guilty of deceit by reason of material, untrue representations 'in respect of his own business or property, the truth of which representations the vendor or lessor is bound and must be presumed to know.'"

In the instant case the plaintiff, the seller of the Schubert piano, through his agent Butler, was not the maker.

It may be noted that defendants in their answer allege scienter "all of which was well known to the plaintiff's agent when he made these representations to the defendants and the said representations were made with the knowledge of their falsity," etc.

From the record the evidence was sufficient to be submitted to the jury.

For the reasons given, there must be a

New trial.

DAVID WILLIAMS v. C. A. PERKINS AND J. P. BARNARD.

(Filed 15 September, 1926.)

1. **Claim and Delivery—Statutes — Principal and Surety — Sheriffs — Wrongful Seizure of Property.**

Where the landlord in claim and delivery pursues the remedy therein provided by statute, C. S., 831(1), 832, 833, 834, of certain farm products raised on the lands, particularly describing them, and in addition the sheriff has seized and retained some of the defendant's household furniture located on the premises, in an action by the defendant in that action against the plaintiff therein and the surety on his bond: *Held*, the plaintiffs in the present action cannot recover damages against the defendants in the claim and delivery proceedings for the wrongful detention of the household furniture not therein specified or described.

2. **Same—Damages—Actions.**

Where the sheriff has wrongfully seized certain personal property of the defendant in claim and delivery, not described therein as the subject of such seizure, the defendant may maintain an independent action for damages against the sheriff.

APPEAL by defendants from *Grady, J.*, and a jury, at April Term, 1926, of CURRITUCK. Modified and affirmed.

The material facts and assignment of error will be considered in the opinion.

Ehringhaus & Hall for plaintiff.
Aydlett & Simpson for defendant.

CLARKSON, J. Plaintiff, David Williams, was a tenant of the defendant, C. A. Perkins. A civil action was instituted by Perkins against Williams. In that action the plaintiff, Perkins, claimed the possession and title to certain corn, etc., raised on his land by Williams, as no settlement has been made for advancements, etc., for making the crops. The provisional or ancillary remedy of claim and delivery was taken out and the corn was seized by the deputy sheriff. The other defendant, J. P. Barnard, was surety on the bond in the claim and delivery proceedings. The action and claim and delivery proceedings were started before the recorder's court of Currituck County. At the hearing the action was dismissed for want of jurisdiction. Plaintiff then sued the defendant and his surety for the crops, corn, etc., wrongfully seized and also for certain articles of household furniture which plaintiff contended was in the barn with the corn and wrongfully seized, consisting of a bed, bedstead, oil-can, etc.

The fourth issue submitted to the jury and the answer thereto were as follows:

"What damages, if any, is plaintiff entitled to recover of the defendant because of the seizure and locking up of his bed, bedstead and other household effects? Answer: $50.00, with 6 per cent interest."

The exception and assignment of error of defendants to this issue: "Defendants requested the court to charge the jury that if they believed all the evidence and found the facts to be as testified that they should answer the fourth issue 'Nothing.'"

The affidavit of claim and delivery, in part C. S., 831 (1): "That the plaintiff is the owner of the property claimed (particularly describing it), or is lawfully entitled to its possession by virtue of a special property therein, the facts in respect to which must be set forth."

The clerk of the court shall (C. S., 832) "thereupon, and upon the giving by the plaintiff of the undertaking prescribed in the succeeding section, by an endorsement in writing upon the affidavit, require the sheriff of the county where the property claimed is located, to take it from the defendant and deliver it to the plaintiff."

The plaintiff's undertaking (C. S., 833): "The plaintiff must give a written undertaking payable to the defendant, executed by one or more sufficient sureties, approved by the sheriff, to the effect that they are bound in double the value of the property, as stated in the affidavit for the prosecution of the action, for the return of the property to the defendant, with damages for its deterioration and detention if return can be had, and if for any cause return cannot be had, for the payment to him of such sum as may be recovered against the plaintiff for the value of the property at the time of the seizure, with interest thereon as damages for such seizure and detention."

Duty of the sheriff (C. S., 834): "Upon the receipt of the order from the clerk with the plaintiff's undertaking, the sheriff shall forthwith take the property described in the affidavit, if it is in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit, notice, and undertaking, by delivering the same to him personally, if he can be found, or to his agent, from whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion."

The record discloses that the affidavit described the property as corn, etc., and nothing in the affidavit indicated that the defendant, Perkins, claimed the possession of the bed, bedstead, oil-can, etc. The bond was given for the corn, etc. The order of the clerk was to seize the corn, etc. The duty of the sheriff was to seize the corn, etc.

Under all the facts, we doubt if the evidence is sufficient to show that the deputy sheriff seized the bed, etc. If the deputy sheriff did seize the bed, etc., wrongfully, an action might be brought against him or his principal or both, but not against the defendants.

In *Draper v. Buxton,* 90 N. C., 184, *Merrimon, J.,* says: "The mere fact that the sheriff sold the property under an execution in favor of the defendants was not evidence, nor was it a fact from which the jury could infer that the defendant had anything to do with the sale of the plaintiff's property. It was the duty of the sheriff in collecting the money specified in the execution, to sell, if need be, the property of the defendant therein—not that of some other person. That he sold the property of the plaintiff raises no presumption of fact that the defendant instructed him to do so, or ratified his act. Cooley on Torts, 127, 128, 129; *Lentz v. Chambers,* 5 Ired., 587."

Wrongful attachments are different from rightful claim and deliveries.

In *Mahoney v. Tyler,* 136 N. C., p. 40, it is held: "That a person leaves the State to seek work, for the purpose of prospecting with a view to change his residence, if desirable, does not sustain an attachment on the ground that the defendant was a nonresident. . . .

The successful defendant in attachment must seek relief for damages in a separate action on the undertaking."

In *Tyler v. Mahoney,* 166 N. C., 513, it is held: "Having been deprived of his property by process of law wrongfully and illegally sued out by the defendants, the law would be unjust to itself as well as to the plaintiff if it did not restore to him that of which he has wrongfully been deprived, or monetary damages in lieu thereof."

In *Tyler v. Mahoney,* 168 N. C., 238, it is held: "The plaintiff herein having been put out of the possession of his property by abuse of the process of the law which was invoked by these defendants, they are responsible to the plaintiff (the defendant in that action) for the damage which he sustained thereby. The sheriff was their agent to execute the mandate of the court, issued at their instance. If the sheriff acted negligently, he might also be responsible, and the sureties on the attachment bond are also responsible for the amount of the damage done. The plaintiff has not chosen to pursue either of these, as he might have done, but he has limited his demand to the principals at whose instance the process of the law was wrongfully put in motion." *Flowers v. Spears,* 190 N. C., 752.

The present action is not like the *Tyler case*—a wrongful attachment—but a lawful *claim and delivery.*

In *Mahoney v. Tyler,* 136, *supra,* p. 43, it is held: "There is no analogy between a proceeding like this and one for the assessment of

damages against a defendant where property has been seized under a requisition in claim and delivery (*Hall v. Tillman,* 110 N. C., 220), nor where the defendant has been arrested in a civil action and held to bail. (The Code, sec. 302; *Patton v. Gash,* 99 N. C., 280), nor for assessing damages against the plaintiff where an injunction has been issued on his application (The Code, sec. 341; *Timber Co. v. Rountree,* 122 N. C., 45), because the latter cases are governed by special statutory provisions. See, also, *R. R. v. Hardware Co.,* 135 N. C., 73." *McAden v. Watkins,* 191 N. C., p. 105.

In *Shute v. Shute,* 180 N. C., 389, it is held: " 'Where an injunction has been wrongfully issued, there is no liability for damages except upon the injunction bond, unless the party against whom the injunction was issued can make out his case of malicious prosecution by showing malice or want of probable cause on the part of the party who obtained it.' 22 Cyc., 1061, citing *Burnett v. Nicholson,* 79 N. C., 548. 'What is said to be the better rule, however, is that although a party may have his remedy on the bond, yet this is not exclusive, and he may, in a proper case, also have a right to maintain an action at law.' 14 R. C. L., p. 481, sec. 183, citing *Howell v. Woodbury,* 85 Vt., 504; Ann. Cas., 1914, D. 606; *Hubble v. Cole,* 88 Va., 236." *Davis v. Wallace,* 190 N. C., p. 548.

The case at bar is an action brought against the party who sued out a rightful *claim and delivery* and his bondsman. The sheriff or his deputy is not the agent of the party who sued out the claim and delivery, but he is an officer to carry out the mandate of the court.

The mandate of the court was to seize corn, etc., the property particularly described. The affidavit, the basis of the claim and delivery, was for corn, etc. The bondsman was responsible for that alone. If the sheriff or his deputy went beyond the mandate and seized other property—bed, etc.—the sheriff and his deputy are solely liable for the wrong done. Any other holding would require a party who sued out a claim and delivery and his bondsman to follow the sheriff or his deputy and see that he carried out the mandate of the court.

There is no evidence on the record that shows that the defendants received any benefit from the seizure of the bed, etc., or they ratified the act of the deputy. Any other holding would be unconscionable—making a party liable and responsible for the unauthorized wrong of another.

The court below should have given the prayer as requested by defendants as to the fourth issue. We see no merit in the other assignments of error.

The judgment of the court below, in accordance with this opinion, is

Modified and affirmed.

ROSA HOLMES ET AL. v. L. J. UPTON ET AL.

(Filed 15 September, 1926.)

Highways—Roads and Highways—Private Owners—Negligence—Highway Commissioners—Bridges—Statutes.

Held in this action to recover damages for a personal injury against the highway commission of a county for negligence in failing to properly maintain a bridge across a public road, and against the owners of the land benefited by the road, that the evidence was insufficient to make the individual members of the commission liable, or the owners of the land, there being no evidence tending to show that such owners had so acted as to assume a liability, but that if any negligence had existed, it was attributable to the commissioners in their official capacity alone. C. S., 3795.

APPEAL by plaintiff from *Grady, J.*, at March Term, 1926, of CAMDEN. No error.

Thompson & Wilson for plaintiffs.
Aydlett & Simpson for defendants.

PER CURIAM. The plaintiff brought suit to recover damages for personal injury. She alleged that a bridge had been constructed over a ditch or canal in Camden County; that it was the duty of the owners of the land benefited by the drain and of the Highway Commission of Camden County to keep the bridge in repair; that they negligently failed to perform their duty in this respect, in consequence of which the bridge had become defective; and that by reason of such defect, while attempting to cross the bridge, she was thrown from a wagon and injured. The owners of the land and the highway commissioners are the defendants; and upon appropriate issues the judge instructed the jury upon all the evidence to answer the issues in favor of the defendants. Exceptions were entered, and from the judgment the plaintiff appealed.

The Legislature made the county highway commission a body corporate. Public-Local Laws, 1917, ch. 62. In her brief the plaintiff admits that no recovery can be had against the commission in its corporate capacity; and in our opinion the allegations and proof are not sufficient to warrant recovery against the individual members. *Hipp v. Farrell*, 169 N. C., 551; *Fore v. Feimster*, 171 N. C., 551; *Hipp v. Ferrell*, 173 N. C., 167; *Howland v. Asheville*, 174 N. C., 749; *Carpenter v. R. R.*, 184 N. C., 400, 406; *Lowman v. Comrs.*, 191 N. C., 147, 152.

We are also of opinion that the owners of the land are not liable under section 3795 of the Consolidated Statutes. The burden is on the plaintiff to show such liability, and it is not made to appear that the construction of the ditch or drain was subsequent to the establishment of the road. *S. v. Davis,* 143 N. C., 611. On the contrary there is evidence that the owners of the land have never had anything to do with the maintenance of the bridge; and all public roads and all bridges along or across the public roads of the county are now under the exclusive supervision and control of the county commission. There is

No error.

EDENTON ICE AND COLD STORAGE COMPANY v. TOWN OF PLYMOUTH, H. V. AUSTIN, MAYOR, AND C. McGOWAN, CHAIRMAN OF THE BOARD OF PUBLIC WORKS.

(Filed 22 September, 1926.)

1. **Municipal Corporations—Ice Factory—Public Utilities—Taxation—Injunction—Ultra Vires Acts.**

   A corporation engaged in the manufacture of ice in a different locality from a town manufacturing ice, and which is not a taxpayer thereof, may not enjoin the town from manufacturing the product on the ground that the act was *ultra vires*, and was the unlawful taking of the money of the taxpayers for a private business enterprise, especially when it is made to appear that the profits supplemented the money necessary to maintain a municipal utility operated under the same municipal management.

2. **Same—Independent Sale to Citizen—Principal and Agent—Competition.**

   An injunction will not issue to stop an incorporated city or town from manufacturing ice on the ground that the plaintiff is a corporation elsewhere existing in the State, and that the defendant, exempt from taxation, was selling ice to other than its own inhabitants in competition with the plaintiff, when it is made to appear that the defendant town was only selling its manufactured product to one of its citizens at the price available to all dealers therein, who personally was a competitor of the plaintiff, and not as an agent of the municipality.

3. **Injunction—Appeal and Error—Evidence—Facts Found — Presumptions—Approval of Findings.**

   Upon appeal where injunctive relief is sought, as in this case, there is a presumption in favor of the ruling of the lower court when supported by evidence, and while the Supreme Court is not bound by such ruling, it is approved upon the record in the instant case.

APPEAL by plaintiff from an order of *Grady, J.,* at Chambers in HERTFORD, 4 August, 1926. Affirmed.

The plaintiff, having its principal office in Edenton, Chowan County, is a corporation organized under the laws of North Carolina and engaged in the manufacture and sale of ice. The town of Plymouth is a municipal corporation in the county of Washington. H. V. Austin is the mayor, and C. McGowan is a member of the board of commissioners.

The plaintiff brought suit in the Superior Court of Washington County to enjoin the town of Plymouth and its agents from selling ice outside the corporate limits of the town as well as within the corporate limits for the purpose of effecting resales in other territory. The substantial allegations are that for about thirty years the plaintiff has been engaged in the business of selling ice in several towns and villages in Washington and Tyrrell counties, other than Plymouth, and is now able to furnish a quantity sufficient for the needs of these places; that for a number of years the defendant corporation has manufactured ice and sold it to the inhabitants of the town; that during the summer of 1926 it sold and has since continued to sell its manufactured product outside the town and within the area covered by the plaintiff's sales in competition with the plaintiff and without authority of law. It is further alleged that the plaintiff is a private corporation, paying an income, franchise, privilege and *ad valorem* tax, while said defendant is exempt from taxation and is supported by the taxation of its inhabitants; that the municipality conducts a private enterprise; that its acts are *ultra vires,* constituting an invasion of the plaintiff's rights and causing it irreparable damage. The allegations in the complaint are supported by affidavits of J. H. Conger, manager of the plaintiff.

The defendants' affidavits tend to show that the town of Plymouth owns an electric light, water, and ice plant, which is operated as an inseparable unit, each unit depending upon the others for the successful and economical operation of the plant, and no department engaging exclusively in the manufacture of ice; that the revenue derived from the sale of ice is necessary to the maintenance of the plant, the light and water departments not being self-sustaining; that the town does not sell ice outside its corporate limits or attempt to control such sale. There is no other ice plant in the town.

Upon consideration of the complaint and the affidavits the trial court dissolved the restraining order and the plaintiff excepted and appealed.

W. D. Pruden for plaintiff.
Zeb Vance Norman for defendants.

ADAMS, J. The basis of the plaintiff's demand for equitable relief is the allegation that the town of Plymouth, through the agency of its co-

defendants, is directly or indirectly engaged in the business of selling ice outside its corporate limits without authority of law, to the irreparable injury of the plaintiff. In reference to this allegation the presiding judge, by consent of all parties, found and in substance set out in his order the following facts: The principal defendant is a municipal corporation owning a public ultilities plant; all the machinery is propelled by the same power and all the departments are under the same management; the town manufactures and sells to its citizens at rates fixed by the board of commissioners both ice and electricity; it has no board of public works, but its governmental functions are under the direction of a board of commissioners, which is the governing body of the town; the defendant, McGowan, is a member of this board, and is privately engaged in the business of buying and selling ice; he buys ice from the town plant at the prescribed rates, loads it on trucks, and then carries it away and sells it to his customers in various places outside the corporate limits of Plymouth.

The plaintiff, insisting that the restraining order should have been continued to the hearing, first rests its argument on the proposition that the defendant has no legal right as a municipal corporation to engage in the business of manufacturing ice; that municipal corporations have only such powers as are expressly granted or necessarily implied; that the record does not reveal the express grant to the defendant of any such authority; and further, that the manufacture of ice is neither a governmental nor a municipal function, and that such power is therefore not implied. This position raises a question as to which there is diversity of opinion. Some of the authorities hold that the manufacture of ice by a municipal corporation and its distribution among the inhabitants is objectionable as involving the possibility of taxation for a purpose not public; others have said that such commodities as ice and coal, on account of the limited sources of supply, do not offer competition as untrammeled as that which obtains in the ordinary articles of commerce, and that for this reason they are proper subjects of municipal traffic. 19 R. C. L., 719(27), 721(28); *Ice and Coal Co. v. Ruston*, 54 L. R. A. (1915B) (La.), 859; *Holton v. Camilla,* 31 L. R. A., N. S. (Ga.), 116, and annotation; *Laughlin v. Portland,* 51 L. R. A., N. S. (Me.), 1143, and annotation. This Court has never decided the exact question, and while keeping in mind the power of municipal corporations with respect to public utilities (C. S., 2787(3), we entertain the opinion that a decision of the point is not necessary to a disposition of the appeal. The plaintiff says, first, that the defendant's act was *ultra vires;* and, in the next place, if not *ultra vires* as to the manufacture and sale of ice within the corporate limits, that the defendant's attempted operation of a public utility in competition with the plaintiff's

business in places outside its corporate limits is unlawful and that it should be enjoined. In one of the affidavits filed by the plaintiff it is averred that the defendant is using the money of the taxpayers of the town for purposes that are unauthorized; and it is asserted by the defendant that neither the electric nor the water department is self-sustaining, and that the making of ice saves the plant from actual loss. Suppose the defendant's manufacture of ice is *ultra vires;* suppose it involves the unlawful imposition of a tax or the wrongful application of revenue; if the taxpayers of the town are satisfied has the plaintiff a cause of action? It owns no property in Plymouth; it is neither a resident of the town nor a taxpayer therein, and it can hardly be financially concerned with the town's governmental or municipal affairs. Unless otherwise provided by statute, a suit of this nature as a rule should be brought by a taxpayer, though he need not be a resident of the town or an individual as distinguished from a corporation. In *Merrimon v. Paving Co.,* 142 N. C., 539, 546, it is said that such actions are maintainable on the theory that the governing body of a municipal corporation occupies a position analogous to that of a trustee and that the inhabitants occupy the position of *cestuis que trustent.* The plaintiff obviously is not of this class; it therefore cannot restrain the corporate acts of the defendant performed within the corporate limits on the ground that they are *ultra vires,* particularly when inferentially approved by those who pay the taxes and support the local government. 5 McQuillan on Munic. Corp., secs. 2585, 2586, 2593. See *Jones v. North Wilkesboro,* 150 N. C., 646; *Moore v. Meroney,* 154 N. C., 158; *Bain v. Goldsboro,* 164 N. C., 102. In fact, we understand the plaintiff practically to concede that it is not entitled to injunctive relief if the alleged wrongful acts of the defendant are done within the corporate boundaries; but the plaintiff contends that the defendant's sales are not confined to the town, but extend to various places several miles away. The evidence in support of this contention is not convincing. The court below found as a fact that the defendant sells the ice to its own citizens; there is no evidence that it has made any sales to people living outside the town. Of course the findings of fact are not binding upon us in a matter of this kind, but they are presumed to be correct, and upon an examination of the entire record we approve the judge's finding in this respect.

If the defendant's sales are confined to its own citizens it necessarily follows that such sales do not *per se* constitute an invasion of the plaintiff's legal rights under the doctrine announced in the decisions relied on by the plaintiff. See *Springfield Co. v. Springfield,* 18 L. R. A. (Ill.), 929. It may be otherwise if at the final hearing the plaintiff is able to show that the defendant in fact sells the ice through the agency

of McGowan; but this allegation is not now shown with sufficient clearness to justify the desired relief.

There is another phase of the case. Is the plaintiff entitled to equitable relief against the defendant McGowan? The cause of action as stated in the fourth paragraph of the complaint is, that beginning with the summer of 1926, the town of Plymouth, acting through its officers and agents, and particularly through the defendants Austin and McGowan, sold and has since continued to sell ice outside its corporate limits. The transactions denounced are treated as the wrongful acts of the town; no individual cause of action is alleged against either of the other defendants. True, the plaintiff's brief refers to C. S., 4388, but there is no allegation, and we presume no contention that McGowan's contract with the municipality, even if nonenforceable between the parties, is a subject of injunctive relief in the present controversy. As McGowan is said to have acted in the capacity of an agent the point does not call for discussion. *Respass v. Spinning Co.*, 191 N. C., 809.

As the record is presented to us, we think the judgment should be Affirmed.

STATE v. R. F. BARKLEY.

(Filed 22 September, 1926.)

1. Game—Ownership.

The ownership of animals *feræ naturæ*, or game, is in the people of the State at large, and not confined to that of the county in which they be found at any time.

2. Same—Counties—License Tax—Constitutional Law—Discrimination.

While the Legislature may enact valid laws for the protection of game and impose a license for hunting it to be paid to the game warden of the county, it may not, without some substantial basis, impose an increased license tax upon residents of other counties of the State than the tax imposed upon the residents of the county where the game is to be found, such being a discrimination inhibited by Art. I, sec. 7, of the State Constitution.

3. Statutes—Constitutional Law—Invalid in Part—Legislative Intent—Constitutional in Part.

Where a statute imposes a license tax for hunting game upon the residents of the county, and a larger tax is imposed upon the residents of other counties thereof, the legislative intent will not be construed to permit the residents beyond the county boundaries to hunt the game therein without the payment of any tax, and they are required to pay the same tax imposed on the residents of the county.

STATE *v.* BARKLEY.

APPEAL by the State from a judgment for the defendant, rendered on a special verdict by *Bryson, J.*, at April Term, 1926, of CABARRUS.

Criminal prosecution tried upon a warrant charging that the defendant, a resident of Mecklenburg County, and being over sixteen years of age, did on or about 30 December, 1925, hunt with dog and gun on the lands of B. W. Means in Cabarrus County, contrary to the statute in such cases made and provided, etc.

It was shown on the trial, and the special verdict establishes, among other things, that the defendant, R. F. Barkley, was, on 30 December, 1925, a resident of Mecklenburg County, above the age of sixteen years; that on said date he hunted with dog and gun on the lands of B. W. Means, situate in Cabarrus County, with the consent of the said Means, but without having obtained a license from the game warden of Cabarrus County, or any other person having authority to issue the same, as required by chapter 573, Public-Local Laws 1925.

Upon the facts found and declared by the jury, a special verdict of not guilty was rendered under appropriate instructions from the court, and from the judgment entered thereon the State appeals, assigning error. C. S., 4649.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

H. C. Jones and C. A. Cochran for defendant.

STACY, C. J. The pertinent provisions of the statute, section 7, subsections (a) and (b), ch. 573, Public-Local Laws 1925, under which the defendant is indicted, are as follows:

"(a) All persons who shall hunt with a gun, and who shall have been a resident of Cabarrus County for three months, and who shall be sixteen years of age or over, shall, before entering any field for the purposes of hunting any wild bird or animal, be required to procure a hunter's license from the game warden or other officer or person authorized to issue said license, and for said license the person procuring same shall pay to the person issuing such license the sum of one dollar, and the license so issued shall be good for one year from the first day of May of the year in which it is issued.

"(b) All persons living in another county, and who shall be sixteen years of age or over, shall pay the sum of three dollars for a hunter's license in Cabarrus County, which shall be good for one year from the first day of May of the year in which it is issued."

The defendant contends that subsection "b" is alone applicable to him, as he is a resident of Mecklenburg County and that said subsection is void because it arbitrarily discriminates against all hunters of the

State, who live outside of Cabarrus County, by requiring them to pay a license tax of $3.00 for the privilege of hunting in said county, while residents of Cabarrus County of three months standing or longer are required to pay a license tax of only $1.00 for the same privilege.

In this jurisdiction, as in many others, it is held that the ownership of animals *ferœ naturœ,* or game, is in the people of the State, or in the State for the use and benefit of all the people, and that the right to hunt and kill such game may be granted, withheld or restricted by the Legislature in such manner and on such terms, as in its judgment, will best subserve the general welfare, subject only to the provisions of the organic law against arbitrary discrimination among the citizens of the State and denial of the equal protection of the laws. *S. v. Gallop,* 126 N. C., 979; *Moore v. Bell,* 191 N. C., 305.

True, it is recognized that, to a limited extent, the owner of land ought to be, and is, under certain restrictions, permitted to take game from his own premises, but this right is entirely subordinate to the right of the law-making body in the exercise of the police power to legislate for the protection of the game of the State. *Council v. Sanderlin,* 183 N. C., 253.

In the exercise of this regulatory power, it has been held that the Legislature may go so far as to confer the exclusive right of fishing, fowling or hunting, upon the citizens of the State, and expressly exclude nonresidents, without violating the constitutional provisions above mentioned. *S. v. Gallop, supra; S. v. House,* 65 N. C., 315; 12 C. J., 1118.

But it is also held that the Legislature may not grant to the inhabitants of the different counties of the State the right to take game within their respective counties to the exclusion of or upon more favorable terms than other residents of the State, without some reasonable basis for the distinction, for this would amount to an arbitrary discrimination against citizens of the State who live outside of a given county and in favor of those who live within it. 27 C. J., 947; *Lewis v. State,* 161 S. W. (Ark.), 154; *Harper v. Galloway,* 51 So. (Fla.), 226, 27 L. R. A. (N. S.), 794, 19 Ann. Cas., 235; *S. v. Hill,* 53 So. (Miss.), 441, 31 L. R. A. (N. S.), 490; *S. v. Bryan,* 99 So. (Fla.), 327; *S. v. Philips,* 70 So. (Fla.), 367.

No reasonable basis appearing for the difference of $2.00 in the license tax required of citizens of the State residing outside of Cabarrus County and those residing in said county, we must hold, in keeping with all the authorities on the subject, that the discrimination made by the statute, now under consideration, against hunters not living in Cabarrus County, offends against Art. I, sec. 7, of the State Constitution, which is as follows: "No man or set of men are entitled to ex-

clusive or separate emoluments or privileges from the community but in consideration of public services."

This, however, need not invalidate the section in its entirety, but only to the extent of the discrimination. *S. v. Mitchell,* 97 Me., 66, 53 Atl., 887, 94 A. S. R., 481. The terms of the Constitution are to be read into the statute, and the law is to be upheld if possible. The law-making body is presumed to have intended a valid, constitutional enactment, and only the unlawful part is to be disregarded, if this can be done without affecting the valid legislative intent. *Harper v. Galloway, supra.* "Where a part of a statute is unconstitutional, but the remainder is valid, the parts will be separated, if possible, and that which is constitutional will be sustained." *Keith v. Lockhart,* 171 N. C., 451. Not only is this the general rule of statutory construction, but section 20 of the act in question expressly provides: "If any clause, sentence, paragraph or other part of this act shall for any reason be adjudged by a court of competent jurisdiction to be invalid, it shall in no way affect or impair the remainder of said act."

We could not hold subsection "b" void *in toto* and leave subsection "a" untouched, without working an unlawful discrimination against the residents of Cabarrus County. The Legislature clearly did not intend such a result. But by applying the constitutional rule of equality, which is to be read into the statute, the discrimination may be removed and the minimum license tax of $1.00 left to apply uniformly to all the residents of the State. This, we think, accords with the legislative intent as expressed in section 20 of the act. Thus the defendant should have applied for a hunter's license and tendered therefor the lawful tax of $1.00, as required by the valid provisions of the statute, before going into Cabarrus County and hunting with dog and gun. He is charged with hunting with dog and gun in Cabarrus County without obtaining a license from the game warden, or any other person having authority to issue the same; and this is made a misdemeanor by the Act of Assembly. Under the findings of the jury, we are of opinion that an adverse verdict should have been rendered against him.

To hold that the defendant, a resident of Mecklenburg County, above the age of sixteen years, is not required by the valid provisions of the statute, to obtain any license at all for the privilege of hunting in Cabarrus County would obviously do violence to the legislative intent, and necessarily render other provisions of the act equally unconstitutional. Such a construction is to be avoided if possible, and we think it can be.

We are not called upon to say whether subsection "a" unlawfully discriminates against *bona fide* residents of Cabarrus County of less

than three months standing, as the question is not presented by the appeal, nor is the defendant in position to raise the point, he not being such a resident of said county.

Let the cause be remanded, to the end that a verdict of guilty may be entered on the special findings of the jury. *S. v. Moore,* 29 N. C., 228.

Reversed.

HERBERT JENKINS v. PAUL H. PARKER.

(Filed 22 September, 1926.)

Reference—Trial by Jury—Objections and Exceptions—Issues.

In order for either party to a compulsory reference under our statute to preserve his right to a trial by jury, he must except to the order at the time it is made, and preserve this right by filing exceptions to the report of the referee, if adverse, and further tender proper issues and demand a jury trial thereon. If the report of the referee be favorable, he must tender issues and demand a jury trial on his adversary's exceptions.

APPEAL by defendant from *Sinclair, J.,* at October Term, 1925, of HERTFORD.

Civil action for trespass, with title to land in dispute and involving a complicated question of boundary.

A compulsory reference was had under C. S., 573, exceptions duly filed to the report of the referee, and a jury trial demanded on some of the exceptions, but no issues tendered.

From a judgment adopting the report of the referee, with additional findings by the judge, and denying the motion for a jury trial on exceptions taken to the referee's report, the defendant appeals.

Alexander Lassiter and Winston & Matthews for plaintiff.

W. H. S. Burgwyn, E. R. Tyler and Stanly Winborne for defendant.

STACY, C. J. The appeal presents the question as to whether the defendant is entitled to a jury trial on any of his exceptions filed to the report of the referee. We think not.

When a compulsory reference is ordered, the party who would preserve the right to have the issues found by a jury, must duly except to the order of reference; and, upon the coming in of the referee's report, if it be adverse, he must file exceptions thereto in apt time, properly tender appropriate issues, and demand a jury trial on each of the issues tendered, and, if the referee's report be in his favor, he

must seasonably tender issues on the exceptions, if any, filed to the report by the adverse party, and demand a jury trial thereon, or else the right to have the controverted facts determined by a jury will be deemed to be waived, so far as he is concerned. *Driller Co. v. Worth*, 117 N. C., 515; *Baker v. Edwards,* 176 N. C., 229.

The reason the successful party before the referee is required to tender issues on the exceptions filed by his adversary and demand a jury trial thereon, in order to preserve his right to have the controverted facts settled by the jury, is apparent when it is remembered that the losing party before the referee may waive his right to a jury trial on exceptions filed by him or withdraw his demand therefor at any time. *Robinson v. Johnson,* 174 N. C., 232.

Here, it is conceded, the defendant tendered no issues on the exceptions filed by him to the referee's report. This was a waiver of his right to have the controverted matters of fact determined by a jury. *Simpson v. Scronce,* 152 N. C., 594.

Other objections to the validity of the trial were argued on the hearing, but as they cannot be sustained, and present no new question of law, we deem it unnecessary to deal with them in an opinion.

Affirmed.

STATE v. J. T. JEFFREYS.

(Filed 22 September, 1926.)

Criminal Law—Bigamy—Reputation — Evidence — Appeal and Error—Statutes.

Evidence of rumors or neighborhood reports are not competent on indictments for bigamy, bigamous cohabitation, or criminal conversation.

APPEAL by defendant from *Sinclair, J.,* at March Term, 1926, of the Superior Court of JOHNSTON County upon a conviction of bigamous cohabitation under C. S., 4342. New trial.

In order to prove the second marriage the State offered the following evidence: "J. V. Woodard, was asked by the solicitor what the neighborhood report was as to the defendant being married to Mrs. Raeburn, to which the defendant objected. Objection overruled, and the defendant excepted. Witness testified that the neighborhood report was that they were married. The defendant moved to strike out this evidence. Motion overruled, defendant excepted. The solicitor then asked the witness as to the general report that the defendant and Mrs. Raeburn were living together. Defendant objects—objection overruled and defendant excepts. Witness testified that the general neighborhood report

was that they were living together. Defendant moved to strike out this testimony; motion overruled and defendant excepts.

"The State offered Mrs. Woodard, as witness: The solicitor asked her as to the neighborhood report about the defendant and Mrs. Raeburn being married. Defendant objects; objection overruled and defendant excepts. Witness testified that the neighborhood report was that they were married. Defendant moves to strike out this evidence; motion overruled and defendant objects. The solicitor then asked the witness if the defendant and Mrs. Raeburn were living together. Answer: She did not know. The solicitor asked her as to the report, to which the defendant objected; objection overruled and defendant excepted. She answered that the report was that they were living together. The defendant moved to strike out this evidence; motion overruled and defendant excepted."

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Parker & Martin for defendant.

ADAMS, J. Hearsay evidence is such as does not derive its value solely from the credit given to the witness himself, but rests in part on the veracity and competency of some other person. No rule is more firmly established than that which excludes evidence of this character; but to this, as to most other general rules, there are some exceptions. One of these exceptions relates to marriage. In *Morgan v. Purnell*, 11 N. C., 95, 97, it is said: "Common reputation in the family is admissible as evidence of a marriage in that family; and it is said that the declarations of an individual of that family are evidence of that common reputation." Two years afterwards it was held that this principle does not apply to actions from criminal conversation (*Weaver v. Cryer*, 12 N. C., 337) and the latter ruling was followed in *Jones v. Reddick*, 79 N. C., 290. In *Archer v. Haithcock*, 51 N. C., 421, *Pearson, C. J.*, said: "It is held to be a general rule that reputation, cohabitation, and the declarations and conduct of the parties are competent evidence of a marriage between them, except in two cases, i. e., on an indictment for bigamy and in an action of 'crim. con.'" Bigamy is made an "exception to the exception" also in *Turner v. Battle*, 175 N. C., 219, 222. Whether the indictment be treated as a charge of bigamy, bigamous cohabitation, or criminal conversation, mere rumors or neighborhood reports are not admissible in evidence. *Hopkins v. Hopkins*, 132 N. C., 25, 30; *S. v. Holly*, 155 N. C., 485. The defendant's objection to the evidence should have been sustained and for this reason there must be a

New trial.

JOSEPHINE ROBERTS v. J. M. SAUNDERS AND M. S. COX, PARTNERS.

(Filed 22 September, 1926.)

1. Wills—Interpretation—Intent.

The courts will construe a will as a whole, giving each word and phrase effect to carry out the intent of the testator, and harmonize the language therein employed when such interpretation is reasonable for the purpose.

2. Same—Statutes—Fee Simple—Presumption.

The statutory presumption that a devise of land shall be construed in fee, etc., gives way to the intent of the testator as gathered from the proper construction of the instrument as a related whole. C. S., 4162.

3. Same—Estates—Life Estates.

Under a devise to the testator's wife of all of his "estate real and personal," and by a later paragraph all of the rest of the testator's property "as above stated" during her widowhood, and should she remarry her dower "according to law": *Held*, only a life estate, according to the testator's intent, is given to his widow, and her conveyance of a fee-simple title is ineffectual, the statutory presumption of a fee-simple title being inoperative.

4. Deeds and Conveyances—Registration—Seal Omitted—Presumptions—Curative Statute.

Where a deed under which a party claims title to land is not introduced, and recites that the seal of grantor was affixed, the introduction of the book of the register of deeds not showing the seal is not conclusive that the seal was not affixed to the instrument itself. It further appears that the defect in this respect, if any, was cured by chapter 64, Public-Local Laws of 1924.

CONTROVERSY without action, before *Grady, J.*, at May Term, 1926, of BEAUFORT.

On 12 July, 1884, Johnson Roberts made his last will and testament, which is as follows:

"Know all men by these presents, that I, Johnson Roberts, of the county of Beaufort and State of North Carolina, do now ordain this my last will and testament in the year of our Lord 1884, 12 July, in form as follows:

"I give to my beloved wife, Martha Roberts, all my estate, real and personal, except fifty acres of land, which I give my daughter, Alviana Downs, which said fifty acres, lying on the east side of public road, beginning in the road leading to Edward's Bridge and running with the Savannah Road and running with said road to the road leading from the Peny place to John Brimage's into W. A. Blount's line, and with said line to Thomas Godley and J. J. Roberts' corner, back with the

S. House Road to the beginning, containing fifty acres more or less, said land to her for her lifetime and then to her son, Johnson R. Downs, at her death.

"All the rest of my property I give to my wife as above stated, during her widowhood; if she should marry, she would be entitled to a dower on the estate in form according to the laws of North Carolina.

"And I ordain my wife, Martha Roberts, sole executrix of this my last will and testament.

"W. H. Roberts and Charles A. Roberts, J. M. Roberts, J. J. Roberts, and Annie E. Roberts, all have a certain part of land given them by deed, which is their part of landed estate, for which they have a deed, day and date above mentioned."

This will was duly admitted to probate. On 14 January, 1885, after the death of Johnson Roberts, his widow, Martha Roberts, and Joseph J. Roberts and his wife executed a mortgage on the land in controversy to John S. McDonald, which was duly recorded. Default having been made in the payment of the indebtedness secured by said mortgage, George H. Brown, Jr., executor of John McDonald, sold the land at public auction under power contained in said mortgage and executed and delivered a deed for said land, together with other property, to P. A. Nicholson. This deed was duly registered. The original deed has been lost, but the record in the register of deeds office does not disclose the seal. The original deed, however, contains this recital: "In witness whereof, the said G. H. Brown, executor as aforesaid, has hereunto set his hand and seal, the day and year first above written."

Thereafter, on 18 March, 1899, Nicholson and wife conveyed the land to Joseph J. Roberts and Josephine F. Roberts, his wife. This was an estate by entirety, and Joseph J. Roberts died more than ten years prior to 29 October, 1925.

On 29 October, 1925, Josephine Roberts, the plaintiff, entered into a contract with the defendants to sell the timber on the land, and tendered proper deed to the defendants for said timber. The defendants declined and refused to accept the deed, contending that Josephine Roberts is not the owner in fee simple of said property because the will of Johnson Roberts did not convey a fee-simple title to Martha Roberts. Martha Roberts survived her husband and is now dead, having never remarried. At the time of his death Johnson Roberts left him surviving as his only heirs at law his five children, to wit: W. H. Roberts, Charles A. Roberts, J. M. Roberts, J. J. Roberts, Alvina Downs, and Annie Roberts, who are all mentioned in his will.

There was judgment decreeing that the plaintiff was the owner of the land in fee simple, and that the defendants be directed to comply with the said contract of sale.

From the judgment so rendered the defendants appealed.

Wiley C. Rodman for plaintiff.
Ward & Grimes for defendants.

BROGDEN, J. Two questions are presented for solution, to wit:

1. Did Martha Roberts take a fee-simple estate under the will of her husband, Johnson Roberts?

2. Is the deed from George H. Brown, Jr., executor of John McDonald, sufficient to convey a fee-simple estate, notwithstanding the absence of a seal on the record in the office of the register of deeds?

C. S., 4162, provides that when real estate is devised to any person that the same shall be held and construed to be a devise in fee simple unless the devise shall, in plain and express words show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity.

Therefore, if the will does contain plain and express words, manifesting an intention to convey an estate of less dignity, the statutory presumption no longer applies.

An examination of the will discloses that in the second paragraph a fee simple is devised Martha Roberts in these words: "I give to my beloved wife, Martha Roberts, all my estate, real and personal," etc. In the third paragraph the language used by the testator is "all the rest of my property I give to my wife as above stated during her widowhood; if she should marry, she would be entitled to a dower on the estate in form according to the laws of North Carolina."

It is now a truism of law that the intent of the testator is the object to be sought in construing a will, and that this dominant intent must be found in an examination of the instrument in its entirety. To this end all of the clauses of a will should be reconciled, if possible, because the maker is presumed to have intended that each and every clause should take effect. This idea is thus expressed by *Justice Brown* in *Shuford v. Brady,* 169 N. C., p. 226: "It is true that in the first paragraph of his will the testator uses language which would confer upon his son Alexander a fee-simple estate to the property devised, but it is well settled that the intent of the testator is the object to be sought in construing a will, and this intent must be gathered from a consideration and examination of the entire instrument."

Adams, J., in *Pilley v. Sullivan,* 182 N. C., 496, says: "Accordingly, the entire will should be considered; clauses apparently repugnant should be reconciled; and effect given wherever possible to every clause and to every word."

Again, in *Foil v. Newsome,* 138 N. C., 115, the Court holds that "prior words of general signification may be controlled and modified as to their meaning by subsequent expressions and the intention of the testator reached from the whole will."

While the second paragraph of the will gives an estate in fee simple, by statutory presumption, it will be observed that the testator does not actually state in express language that the property is given to his wife in fee simple. In the third paragraph of the will the testator says: "I give to my wife, as above stated, during her widowhood." Hence the words "as above stated" refer to the nature of the estate the testator intended to devise as distinguished from the statutory presumption. Then, too, the fact that the estate was reduced from a life estate to a dower interest, in the event of remarriage, is a manifest indication of the testator's purpose to devise his wife an estate of less dignity than a fee simple.

We are of the opinion that the controlling intention of the testator was to give this property to his widow for her widowhood, and, in the event she married, to devise to her the same interest in the property that the law gave to widows, to wit, a dower interest therein. This construction of the will would vest only a life estate in the widow, Martha Roberts.

While it is true that in the last paragraph of the will the testator refers to the fact that he has given his children their part of the landed estate by deed, this language must be construed in subordination to the dominant intent of the testator as gathered from the entire instrument.

We hold therefore that Martha Roberts took a life estate under said will, and that the plaintiff cannot deliver to the defendants a fee-simple title to said property.

In regard to the second question presented by the appeal, the mere fact that no seal appeared upon the records in the office of the register of deeds is not conclusive as to whether or not a seal was actually affixed to said deed. *Heath v. Cotton Mills,* 115 N. C., 202; *Strain v. Fitzgerald,* 130 N. C., 600.

However, chapter 64, Public Laws, Extra Session, 1924, provides that "all deeds executed prior to ratification of this act by any sheriff, commissioner, receiver or other officer authorized to execute a deed by virtue of his office or appointment, in which the officer has omitted to affix his seal after his signature, shall be good and valid nevertheless; provided this act shall not apply to actions pending at the date of the ratification of this act."

The act was ratified 22 August, 1924, and this suit was brought apparently on 12 February, 1926. The act referred to therefore cures any defect which might have existed in said deed.

Reversed.

J. B. GILLAM v. JAMES S. CHERRY, ANNIE L. CHERRY, AND HENRY CHAVIS.

(Filed 22 September, 1926.)

1. **Judgments—Pleadings—Default—Lands—Title—Fraud — Statutes — Admissions.**

Where the complaint in an action is to subject land fraudulently conveyed to the payment of a judgment, and it is alleged that pending the action the defendant had conveyed the *locus in quo* to the codefendant in fraud and without consideration, who with knowledge of the fraud had accepted the conveyance, upon judgment by default for the want of an answer, such allegations will be taken as true.

2. **Same—Default Final—Default and Inquiry—Damages—Appeal and Error.**

Where the plaintiff is entitled to judgment by default in an action involving the title to lands, and an inquiry as to the amount of damages is dependent upon this question alone, he is entitled to judgment by default final, and judgment by default and inquiry is erroneously entered.

APPEAL by plaintiff from *Midyette, J.*, at January Term, 1926, of BERTIE. Error.

The material facts setting forth the controversy were found by the court below and judgment rendered as follows:

"Summons issued in this action on 17 September, 1925, and plaintiff filed his verified complaint in this court on that date. The summons were returnable on 30 September, 1925. The summons and complaint were duly served upon the defendants, James S. Cherry and Annie L. Cherry on 19 September, 1925, by the sheriff of Bertie County, such service being made by the reading of the summons to the said defendants, and by leaving copies of said summons and said verified complaint with the said defendants. The sheriff made his return on the said summons, showing service of both complaint and summons on said defendants, and the clerk of the Superior Court of Bertie County entered such return upon the summons docket. The said defendants failed to file answer or other pleadings or defense bond, within twenty days after the service of said summons and complaint upon them. On 12 October, 1925, after twenty days from the service and complaint upon said defendants, the plaintiff appeared before the clerk of the Superior Court and moved for judgment by default final against the said defendants upon the cause of action set out in the complaint. This motion was refused by the clerk of the Superior Court who allowed the defendants until 20 October, 1925, in which to file their answer; and the plaintiff appealed therefrom to the judge of the Superior Court.

Afterwards, on 29 October, 1925, the defendants, James S. Cherry and Annie L. Cherry, served notice upon the plaintiff that they would move before this court for additional time for the filing of the answer to the complaint, such notice being given while such appeal was pending before this court. It further appears to the court that the plaintiff used all diligence in moving for such judgment and was not guilty of laches. It further appears that the plaintiff, J. B. Gillam, brought an action against the defendant, James S. Cherry, in the Superior Court of Bertie County, on 16 March, 1922, such action being brought to recover the sum of $838.77 and interest thereon from 5 March, 1921, such sum being due on contract, and that the plaintiff recovered judgment on said debt against the said Cherry at February Term, 1925, of said court, such judgment being docketed in the office of the clerk of the Superior Court in Book of Judgments ....., page..... That at the commencement of such action the defendant, James S. Cherry, was the owner of the lands described in the complaint, but pending said action, the said James S. Cherry, on 8 February, 1923, without any consideration and with the intent and purpose of hindering, delaying and defrauding the plaintiff out of the collection of his debt, and also with a like purpose to defraud other creditors, conveyed the said lands to his step-mother, Annie L. Cherry, with whom he then resided, and that the said Annie L. Cherry received and accepted said deed with full knowledge of such intent and purpose of said James S. Cherry; and at such time, and now, the said James S. Cherry owned no other real estate; and is now insolvent. It appears that the facts stated in the complaint are true, and that the defendants have not a meritorious defense to the plaintiff's cause of action; and that the plaintiff is entitled to the relief demanded in the complaint; but this court is of the opinion that the plaintiff is not entitled, as a matter of law, to a judgment by default final, but only to a judgment by default and inquiry. It is, now, therefore, ordered and adjudged that the motion of the defendants for time in which to file answer to said complaint be and the same is hereby refused and denied; and that the order of W. L. Lyon, clerk of the Superior Court of Bertie County, refusing the motion of the plaintiff for judgment and allowing said defendants additional time in which to answer is vacated and set aside. It is further ordered and adjudged that the plaintiff recover judgment against the said defendants upon the cause of action set out in the complaint by default and inquiry, with the effect provided by law, and that the said cause be transferred to the civil issue docket in order that such inquiry may be had."

The plaintiff excepted and assigned as error the refusal of the court below to grant his motion for judgment by default final against the

defendants, James S. Cherry and Annie L. Cherry, upon the causes of action set out in said complaint, and upon the facts appearing in the case and found by the judge in the said judgment and order, and appealed therefrom to the Supreme Court of North Carolina. This is the only exception and assignment of error in the record, and the only one to be heard on this appeal. The defendant, Henry Chavis, was not served with process and pleading and no relief asked against him.

Gillam & Davenport for plaintiff.
Craig & Pritchett for defendants.

CLARKSON, J. Freeman on Judgments, 3rd vol., 5th ed. (1925), part sec. 1282, says: "The effect of a default as an admission and as dispensing with proof of the facts varies somewhat with the statutes governing the matter. *Generally, however, a default admits all of the material traversable allegations of the declaration, complaint or petition.* (Italics ours) It admits the facts alleged as to the cause of action and precludes any showing of defensive matters, though as to the damages, except in those cases where the clerk or the court is authorized to enter judgment for the amount claimed, there is no admission, but proof is required. Though an allegation be defective in form it is nevertheless admitted. When title or ownership is a material allegation, as in an action of ejectment or other action to try title, a default admits it. This is true as to the title of a personal representative as such, and his default admits that he has sufficient assets to meet the claim alleged. So an alleged trespass is admitted, as is fraud, in some states. But the admission by a default extends only to those material matters which would be admitted by a failure to deny or traverse them in an ordinary case, and therefore does not extend to allegations which are mere conclusions of law." 15 R. C. L., sec. 117, p. 667; 34 C. J., sec. 386, p. 173; *Mitchell v. Express Co.*, 178 N. C., p. 235; *Mfg. Co. v. McQueen*, 189 N. C., p. 312.

C. S., 595, subsections 1, 2, 3 and 4, set forth when judgments by default final may be had on failure of defendant to answer, etc.

C. S., 596, is as follows: "In all other sections, except those mentioned in the preceding section, when the defendant fails to answer and upon a like proof, judgment by default and inquiry may be had as provided in the last section but one, and inquiry shall be executed at the next succeeding term. If the taking of an intricate or long account is necessary to execute properly the inquiry, the court, at the return term, may order the account to be taken by the clerk of the court or some other fit person, and the referee shall make his report at the next

succeeding term; in all other cases the inquiry shall be executed by a jury, unless by consent the court is to try the facts as well as the law."

Justice H. G. Connor, writing for a majority of the Court, in *Junge v. MacKnight,* 137 N. C., p. 285 (this case is reported in 135 N. C., p. 105, petition to rehear in which the first decision was reversed, *Justice Connor* in former opinion dissenting), it was held: "In an action to determine conflicting claims to real property, the failure of the defendant to answer at the return term entitled plaintiff to a judgment by default final in accordance with the facts stated in the complaint, without inquiry or proof of such facts."

In the *Junge cases, supra,* the effect of C. S., 595-6, was thoroughly discussed, and we need not go into the controversy as a majority of the Court, in the last case, held that a judgment by default final was the correct procedure. *Montgomery, J.,* concurring in the last case, said (p. 292): "I conclude, therefore, that judgment by default and inquiry in sec. 386 of The Code (C. S., 596), has reference only to actions sounding in damages."

In *Jernigan v. Jernigan,* 178 N. C., p. 85, it is held: "This was a proceeding to set aside a judgment by default final on the ground of irregularity and excusable neglect. *The action was to declare certain deeds void and the plaintiff the owner of the lands in fee simple.*

The complaint was duly verified and filed 3 July, 1916, and judgment by default final entered at September Term, no answer having been filed. The summons was issued returnable to the May Term, and was served on 11 May, 1916. *The judgment by default final was regular* (italics ours). Rev. 556 (4); *Junge v. MacKnight,* 137 N. C., 285; *Stelges v. Simmons,* 170 N. C., 44; *Lee v. McCracken, ibid.,* 576."

In *Greeley v. Sample et al.,* 22 Iowa Reports, p. 338, the principle is recognized: "Where default is made to a petition which alleges that defendant holds certain real estate fraudulently and in trust for another, such allegations will be taken as true."

Armstrong v. Asbury, 170 N. C., p. 160, cited by defendant, is not in conflict with the position here taken. In that case it is said, at p. 162: "In other words, the cause of action alleged against the defendant McRae is his liability upon the agreement between the stockholders, and his complaint is that he was not permitted to prove that he was not a party to the agreement. This he could not do, because he is precluded by the judgment by default and inquiry, which establishes the cause of action, that is, that he was a party to the agreement, and only leaves open the amount of the recovery. *Banks v. Mfg. Co.,* 108 N. C., 282; *Blow v. Joyner,* 156 N. C., 142; *Graves v. Cameron,* 161 N. C., 549. The concluding sentence of the authority relied on by the defendant

Allen v. McPherson, 168 N. C., 436) is that 'It (a judgment by default and inquiry) establishes merely that the plaintiff has a cause of action,' and this brings it in harmony with the other cases."

We are of the opinion that plaintiff's assignment of error should be allowed and judgment by default final rendered. For the reasons given, there is

Error.

MILES F. BIXLER COMPANY v. MRS. E. C. BRITTON.

(Filed 29 September, 1926.)

1. Contracts—Cancellation—Evidence—Principal and Agent—Letters.

Where a contract for the sale of merchandise is in writing and provides that no agreement of the agent will be binding upon the vendor when not therein stated, and the purchaser has signed and accepted the contract, evidence that the vendor had since agreed to the rescission or amendment of the contract is not sufficient when it consists of a letter purporting upon its face to have been written by the general manager of the seller to its sales agent to that effect, when the authority of the general manager to make this agreement is not otherwise shown.

2. Same—Declarations.

A letter purporting upon its face to have been written by the general manager of a vendor corporation to its sales agent, canceling an order which the latter has taken from a purchaser, is alone but a declaration of the agency of the general manager after the contract had been consummated, and is incompetent in the purchaser's behalf to show that the contract had been canceled, on the vendor's action against the purchaser upon the contract.

3. Contracts—Cancellation.

A written contract may be abandoned or relinquished: (1) by agreement between the parties; (2) by conduct clearly indicating such purpose; (3) by the substitution of a new contract inconsistent therewith.

4. Evidence—Depositions.

Where the depositions used upon the trial of an action appears to have been duly taken in accordance with law, it will not be held defective as to certain parts written by another in the presence of the commissioner, duly certified by him, signed by the witnesses, and having in all respects been duly taken.

CIVIL ACTION, tried before *Cranmer, J.,* at April Term, 1926, of HERTFORD.

Lloyd J. Lawrence for plaintiff.
Bridger & Eley for defendant.

BROGDEN, J. On 12 June, 1922, the defendant signed a written contract for certain jewelry named in the contract. This contract was accepted by the plaintiff on 19 June, 1922. Among other provisions appearing in said written contract was the following: "Salesman has no authority to change or add to these terms except in writing on this original order, which is subject to our acceptance. Not subject to countermand. Delivery to carrier is delivery to purchaser; purchaser to pay the charges. Jewelry shipped by express, show case by freight." The defendant admitted the execution of the contract, but contended that the contract had been canceled by the plaintiff. A. Oettinger, who made the contract with the defendant and took the order, was agent for the plaintiff.

The facts in regard to the cancellation of the contract are as follows: On 13 July, 1922, the defendant wrote a letter to Oettinger about the matter. This letter does not appear in the record, but on 15 July, 1922, Oettinger wrote the defendant as follows: "Dear Madam: Your favor of the 13th inst. at hand and noted, and by this mail I am requesting the Miles F. Bixler Company, Cleveland, Ohio, to cancel order, in accordance with your wishes. Regretting your decision not to handle the line.

Very truly yours, A. Oettinger."

On 15 July, 1922, A. Oettinger wrote a letter to the plaintiff in which letter, among other things, occurs the following: "Under date of 13th inst. Mrs. E. C. Britton requests me to cancel the order placed with me for jewelry, and says she has special reasons for making this request, and would write to you direct, but is not able to locate your address. I am sending her your address by this mail, and it may be she will write you direct regarding the matter. Regret this decision on her part, but will only learn her reason on my next visit. Kindly cancel order, as she requests."

Thereafter, on 19 July, 1922, the plaintiff wrote the following letter to the agent, Oettinger: "Dear Mr. Oettinger: Your letter of the 15th received with advice that you are returning samples. Upon their checking out in accordance with terms of agreement, we will promptly cancel and return bond to you," etc. "We note what you say in regard to Mrs. E. C. Britton. We have not heard from her as yet, but when we do we will follow your suggestion." There was reference in the letter to other matters which are not pertinent to this appeal.

The plaintiff objected to the introduction of these letters between the defendant and the agent, and the plaintiff and the agent. The objection was sustained, and the defendant excepted.

The defendant asserts that the letter of 19 July from the plaintiff to the agent, Oettinger, in which the plaintiff states, "We note what you say

in regard to Mrs. E. C. Britton. We have not heard from her as yet, but when we do, will follow your suggestion," amounts to a cancellation of the contract.

A written contract may be abandoned or relinquished: (1) by agreement between the parties; (2) by conduct clearly indicating such purpose; (3) by the substitution of a new contract inconsistent with the existing contract. *Redding v. Vogt,* 140 N. C., 562; *Lipschutz v. Weatherly,* 140 N. C., 365; *Public Utilities Co. v. Bessemer City,* 173 N. C., 482; *Faust v. Rohr,* 167 N. C., 360.

The defendant testified: "I have never had any written statement from the company that it would release me from the contract." Therefore, the only proof of a cancellation or rescission of the contract was contained in the letter from the agent Oettinger to the plaintiff, and the reply thereto by the plaintiff under date of 19 July. All of these letters were incompetent. The said letter of 19 July from plaintiff to Oettinger purported to be signed by A. F. Gibson, vice-president and manager of the plaintiff company. There is no evidence as to the authority of said Gibson to write the letter, particularly after the contract for the merchandise had been accepted by the plaintiff on 19 June, 1922. It was therefore the declaration of an agent for the plaintiff to another agent who was not a party to the suit, and after the contract had been closed. Such declarations of agents are incompetent and inadmissible. *Smith v. R. R.,* 68 N. C., 108; *Rumbough v. Improvement Co.,* 112 N. C., 751; *Egerton v. R. R.,* 115 N. C., 646; *Williams v. Tel. Co.,* 116 N. C., 558; *Summerow v. Baruch,* 128 N. C., 202; *Sternberg v. Crohon,* 172 N. C., 731; *R. R. v. Smitherman,* 178 N. C., 595.

The principle of law enunciated in all of these decisions on this particular point is expressed thus in *Williams v. Telegraph Co., supra:* "The fact that Coghill was general manager of the defendant makes no difference. He was still but an employee of the defendant, and not the defendant; and any statement of his that was not a part of the *res gestæ* was but hearsay and incompetent."

There were exceptions taken to a deposition offered by the plaintiff because the answers of the witnesses were not actually written down by the commissioner before whom the deposition was taken. The record shows that the testimony of the witnesses was reduced to writing by a disinterested person, read over by the witnesses, and sworn to and subscribed by them in the presence of the commissioner taking the deposition. This was a sufficient compliance with the law in the absence of any evidence tending to show any irregularities or misconduct in the taking of the deposition. Indeed, the deposition having been taken apparently on the day, at the place, and by the person named in the notice,

the presumption in the absence of notice to the contrary, is that all things were done correctly. *Younce v. Lumber Co.,* 155 N. C., 240.

There were also exceptions to the competency of certain evidence in the deposition, but these exceptions are without merit for the reason that the controlling question of law involved in this appeal was whether or not the letters referred to constituted a rescission or abandonment of the contract sued on. In addition, C. S., 1819, requires that objection to incompetency of testimony and motion to reject the evidence must be made in writing before the trial, unless, of course, the parties shall consent to a waiver of this provision. *Steel Co. v. Ford,* 173 N. C., 195; *Morgan v. Fraternal Association,* 170 N. C., 81.

Upon a careful examination of the entire record we are of the opinion that the case has been correctly tried.

No error.

A. B. LITCHFIELD, RECEIVER OF THE BANK OF ROPER, v. MARY A. ROPER.

(Filed 29 September, 1926.)

1. Statutes—Interpretation—Repeal by Implication.

The law does not favor a construction of a later statute that repeals a prior one on the same subject-matter by implication, or without express words to that effect, and will not so construe it unless it clearly appears that the legislative intent was to do so, and then only to the extent that is necessary to make a construction of the two statutes consistent and reasonable.

2. Same—Banks and Banking.

C. S., 423, under which action must be brought against a stockholder of a bank since becoming insolvent to enforce his additional liability on his shares of stock therein, 1 C. S., 237; 3 C. S., 218(a), 219(a), is by chapter 4, Public Laws 1921, extended to an action by the receiver to recover therefor to ten years from the discovery of the condition of the insolvent bank. C. S., 240.

3. Same—Intent.

While by a complete or entire codification of the laws upon a specific subject, former statutes upon the subject may be construed to have been repealed by implication when not therein included, the principle will not apply when from a proper interpretation of the codified laws it appears that the legislative intent was only to enlarge the former law.

4. Same—Repealing Clause.

The codification of the laws by legislative enactment repealing all laws in conflict therewith, does not repeal a former law upon the same subject-matter when it appears by proper interpretation that the legislative intent by the later law was to enlarge the provisions of the former one.

LITCHFIELD *v.* ROPER.

APPEAL by defendant from *Grady, J.*, at July Term, 1926, of WASHINGTON.

Trial by jury was waived (C. S., 568) and the judge found the following facts: The Bank of Roper was a corporation, which becoming insolvent was put in the hands of a receiver in October, 1921, upon application of the State Corporation Commission. When the receiver was appointed the defendant was the owner and holder of twenty-two shares of the capital stock of said bank of the par value of $100 a share. On 10 January, 1923, an order was made assessing against the stockholders of the bank one hundred per cent of the par value of their stock, the court finding as a fact upon the petition filed in the suit prosecuted by the Corporation Commission against the bank that said assessment would not be sufficient to pay all the creditors of the bank in full. The present action was brought by the receiver on 2 March, 1926, for the purpose of collecting from the defendant the sum of $2,200 in accordance with the assessment made against her on 10 January, 1923. After the institution of the action Litchfield died and Z. V. Norman was appointed to succeed him as receiver of the bank. When Litchfield was made receiver the defendant had on deposit in the bank $336.77. On 10 January, 1923, Litchfield as receiver was directed by the court to bring suit against the directors of the bank to recover from them the losses which the bank had sustained by reason of the negligence of the directors, but such suit was never instituted. In February, 1926, Litchfield as receiver paid to the creditors of the bank under an order of court a dividend of ten per cent of the amount of their claims, but no payment was made to the defendant on account of her deposit. Immediately after the assessment was made on the stockholders on 10 January, 1923, the receiver made demand upon the stockholders for the payment of this liability.

Upon the foregoing facts it was adjudged: (1) that the defendant is not entitled to set off her deposit against the assessment for which this action was brought; (2) that the defendant is not entitled to have the action for negligence against the directors determined before her liability on her assessment is adjudged; (3) that this action is not barred by the statute of limitations. It was further adjudged that the defendant is liable in law for one hundred per cent of the par value of her stock, and that the plaintiff recover of the defendant $2,200 and costs, and that the attached stock be condemned for the satisfaction of the judgment and sold after twenty days notice if the judgment was not paid within thirty days. The defendant excepted and appealed.

Ward & Grimes for plaintiff.
Small, MacLean & Rodman for defendant.

ADAMS, J. It is provided by statute that the stockholders of every bank organized under the laws of North Carolina shall be individually responsible, equally and ratably and not one for another, to the amount of their stock at the par value thereof, for all contracts, debts, and engagements of the bank, and that suit to enforce such liability may be brought by the receiver of the insolvent corporation. 1 C. S., 237; 3 C. S., 218(a), 219(a); *Smathers v. Bank,* 135 N. C., 410. The object of the present action is to enforce this statutory liability against the defendant upon an assessment of $2,200 duly made upon twenty-two shares of stock held by her in the Bank of Roper. The sole question is whether the plaintiff's action is barred by the statute of limitations.

The Code of Civil Procedure, under the title "General Provisions as to the Time of Commencing Actions," contains the following statute: "This title shall not affect actions against directors or stockholders of any moneyed corporation, or banking association which shall hereafter be incorporated by or under the laws of this State, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created." Battle's Rev., 153 (54); The Code, sec. 175. With slight changes in phraseology this statute was brought forward in the Revisal of 1905 (sec. 378) and in the Consolidated Statutes (sec. 423). In 1911 the General Assembly enacted a statute authorizing the receiver of any insolvent bank to demand, sue for, and collect all indebtedness due from its stockholders and providing that the receiver may within ten years after an assessment on the stock institute civil actions against the stockholders to reduce their liability thereon to final judgment. C. S., 240. Again, at the session of 1921 the Legislature enacted a series of statutes entitled "An act to regulate banking in the State of North Carolina; to provide for the incorporation of banks, and the amendment, renewal, and surrender of charters; to provide for the more thorough supervision of corporations doing a banking business; to provide penalties for the violation of laws with reference to banking and the banking business and for other purposes." Laws 1921, ch. 4. The defendant contends that these statutes operate as a revision of the banking laws and that chapter 5 of the Consolidated Statutes, including section 240, is thereby abrogated in its entirety.

We are not inadvertent to the doctrine that a revision or codification of statutes manifestly intended to embrace the entire subject of legislation has the effect of repealing former acts dealing with the same subject, although there is no repealing clause to that effect. Some of the courts say that the rule rests upon the principle of repeal by implication;

others, that it rests upon the doctrine that a revision of particular statutes by the enactment of others intended as a complete scheme of the subject imports a legislative declaration that whatever is embraced in the new law shall prevail and that whatever is excluded shall be deemed repealed. But the authorities uniformly recognize as decisive of the question either an irreconcilable conflict between statutes or the legislative intention to codify or revise the entire matter to which both statutes or both sets of statutes relate and to substitute the later legislation for the old law upon the subject. 25 R. C. L., 924 (175); *Murdock v. Memphis,* 20 Wall., 590, 22 Law Ed., 429; *Ice Co. v. R. R.,* 31 Ann. Cas. (N. H.), 1090; *Platt Institute v. New York,* 5 Ann. Cas., 195, and annotation; *Comrs. v. Henderson,* 163 N. C., 114.

A revision or codification of statutes, as generally understood, signifies a written expression of the entire body of the law on the particular subject; but where the scheme of revision is intended as a continuation of existing laws, together with such changes as are necessary to make them more effective or to harmonize them, the revised laws will not usually operate as a repeal. The mere enactment of a part of a former statute will not necessarily repeal the part which is not included in the subsequent act. *Howard v. Hulbert,* 88 A. S. R., 267, and annotation 287, 288.

After comparing the act of 1921 with chapter 5 of the Consolidated Statutes we are by no means convinced that the later statutes were intended by the Legislature as a repeal of the old law. The appellant insists that section 240 has been superseded by section 17 of the act of 1921, and she invites a comparison of the two sections. It is important to observe that section 240 empowers the receiver to collect by lawful process all indebtedness due from the stockholders "wherever they or their legal representatives may be served or wherever any property belonging to them may be subject to attachment or other lawful process." Section 17 leaves this provision unimpaired, but it confers on the receiver additional authority to bring suit against a resident stockholder in the Superior Court of the county in which the banking office may be located, and makes further provision as to nonresident stockholders. The object was merely to enlarge the venue. The other provisions of section 240 are not affected. And so with other sections. It is true that all laws and parts of laws in conflict with the later act are repealed (section 88), but we have discovered no provision which expressly repeals section 240, and in our judgment its repeal has not been effected by implication. As a general rule the law does not favor implied repeals. A statute may be repealed by implication and without any express words, but the leaning of the courts is against the doctrine if it is possible to reconcile the several acts. *Bunch v. Comrs.,* 159 N. C., 335. In fact, it

has been held that the implication in order to be operative must be necessary, and that even then it abrogates the older act only to the extent of its repugnancy to or inconsistency with the act of later date. *Winslow v. Morton,* 118 N. C., 486, 491; *S. v. Perkins,* 141 N. C., 797; *Kearney v. Vann,* 154 N. C., 312; *Bramham v. Durham,* 171 N. C., 196; *Sanatorium v. Lacy,* 173 N. C., 810.

The defendant has reminded us that C. S., 237, 239, and 240 in express terms apply to banks chartered under the laws of this State; that an action against a stockholder in a National Bank is barred in three years by section 423, and that the law as to State and National banks should be uniform. But these statutes were in effect when the act of 1911 (sec. 240) was enacted, and we must assume that the General Assembly acted with deliberation and had good reason for extending the limitation of actions for an assessment against the stockholders of a bank from three to ten years. The judgment is

Affirmed.

ROSAMOND A. VAN DYKE v. PRUDENTIAL INSURANCE COMPANY.

(Filed 29 September, 1926.)

1. **Courts—Federal Decisions—Removal of Causes.**

   The decisions of the Supreme Court of the United States are controlling upon the question of removal from the State to the Federal Court under the United States statute.

2. **Same — Insurance — Foreign Corporations — Domesticating Acts — Waiver.**

   Held, under the decisions of the Supreme Court of the United States binding upon the Supreme Court of North Carolina, a life insurance company of another state, having complied with the Federal statute, may remove an action against it involving more than three thousand dollars, etc., from the State to the Federal Court, and its compliance with the State domesticating statute does not waive or lose this right.

APPEAL by plaintiff from *Sinclair, J.,* at August Term, 1926, of PITT. Affirmed.

S. J. Everett for plaintiff.
Pou & Pou, James H. Guest and J. L. Emanuel for defendant.

CLARKSON, J. The sole question presented by this appeal is whether the above-entitled action has been legally removed from the Superior

Court of Pitt County to the United States District Court at Washington, North Carolina. If the case has been legally removed the judgment should be affirmed. If not so removed, plaintiff, appellant, contends that the judgment is erroneous. Appellee, defendant, contends that the appeal should be dismissed upon an inspection of the record.

This action was instituted in the Superior Court of Pitt County by plaintiff, a resident of Pitt County, against defendant, a corporation chartered in New Jersey and organized in that State, and a resident and citizen of that State. Defendant was duly licensed to carry on the business of soliciting applications for insurance in this State. The sum demanded by plaintiff was $5,000.

In apt time, defendant filed, after due notice to plaintiff, a petition duly verified in the usual form, and setting forth a cause for removal; and with good and sufficient bond in the sum of $500, in connection with said petition; and the clerk of the Superior Court of Pitt County, duly approved said bond as to its form, sufficiency and solvency. All this was accomplished in the due and regular course of practice, as prescribed by the statutes of the United States and of this State, governing removals to the United States Court; and all was done within the times required by the statutes of this State.

The clerk of the Superior Court of Pitt County, on hearing the petition of defendant and considering the same, made an order removing the action to the United States District Court at Washington, North Carolina, and duly certified the proceedings, and transmitted the record thereof to said United States Court, where the same was duly docketed and is now pending. Plaintiff gave notice of an appeal from the clerk's order to the Superior Court of Pitt County, and plaintiff's appeal was heard at August Term, 1926, of said court; and his Honor, Judge Sinclair, affirmed the ruling of the clerk, and found as facts that

"This action was one between citizens of different states, and that the sum in issue exceeded $3,000.00, exclusive of interest and costs; that petition duly verified was filed by defendant within the time prescribed by statute, and notice given to plaintiff, and that a bond conditioned according to law, and satisfactory as to solvency and form was duly filed; that the clerk of this Court duly made an order removing the cause to the United States District Court for the Eastern District of North Carolina-Washington Division; and that transcript of the record has been forwarded to the clerk of said United States District Court; and that the cause was removable under the act of Congress governing removal of causes; and that the act of the clerk of this Court was in all respects regular and in accordance with the statute and in conformity to the practice obtaining in the removal of causes."

From the judgment of the Superior Court rendered at said August Term, affirming the order of the clerk, this appeal was taken by plaintiff, for the sole purpose of obtaining from this Court a decision upon the removability or nonremovability of this cause.

Plaintiff contends: "That no court existing under and by virtue of the laws of the State of North Carolina has the power to remove an action from the courts of the State to the United States courts wherein any action is brought upon an insurance policy which was issued by a company qualified to do business in this State under chapter 106, Consolidated Statutes." And in reaching that conclusion, plaintiff asserts, that "The defendant has established a power of attorney, complied with the law which enabled it to do business in this State, and thereby became a domestic corporation for that purpose. In complying with this requirement of the law and doing business in this State under the said requirements, it has waived its right to remove a cause to the United States Court, and is estopped thereby."

The argument of plaintiff's counsel as to the right of the State in the case at bar is persuasive, but cannot be binding. We are controlled by the decisions of the Supreme Court of the United States. These decisions have been followed, in duty bound, by this Court. *Southern Railway Co. v. Allison,* 190 U. S., 326, 47 L. Ed. 1079, (Reversing *Allison v. Southern Railway Co.,* 129 N. C., 336, 40 S. E., 9); *Terral, Secy. of State of Ark., v. Burke Con. Co.,* 257 U. S., 529; *Powell v. Assurance Society,* 187 N. C., 596; *Timber Co. v. Ins. Co.,* 190 N. C., p. 801; *Huntley v. Express Co.,* 191 N. C., p. 696.

Hon. Chester I. Long (U. S. Congressman and Senator), President of the American Bar Association, in his address at Denver, Colorado, 14 July, 1926, said, in part: "The one protection for the liberty of the individual is in the Supreme Court of the United States. The power has been exercised for over a century to declare when an act of Congress or of a state legislature is not a law because it violates the Constitution of the United States. . . . Liberty will abide here if we maintain our dual nation; it will disappear when we destroy the even balance between the national and state governments. . . . The advance of the organized American Bar in the preservation of the liberty of man, woman and child is very reassuring. Let us hope as the organized Bar increases in members, power and influence *that the blessings of liberty and of local self-government may be made more secure to ourselves and to our posterity.*"

Mizzell v. R. R., 181 N. C., p. 36, cited by plaintiff, is not analogous. In that case the Atlantic Coast Line Railroad Company was a domestic corporation.

The judgment below is

Affirmed.

STATE v. EXUM MOORE.

(Filed 29 September, 1926.)

Instructions — Evidence — Directing Verdict — Statutes — Expression of Opinion—Appeal and Error.

Where the defendant is on trial for the unlawful sale of intoxicating liquor, and the only testimony is given by two witnesses as having bought it from him at different times, and the defendant's evidence is in contradiction of one of them, a charge by the court for the jury to return a verdict of guilty if they believed or found as true the testimony of the other witness (capable of only one meaning), is not an expression of the court's opinion upon the weight and credibility of the evidence, inhibited by C. S., 564.

APPEAL by defendant from *Cranmer, J.*, at June Term, 1926, of the Superior Court of HALIFAX County. No error.

The defendant was charged with violation of the prohibition law. At the close of the State's evidence the solicitor said he would insist on a verdict only for the unlawful sale. In behalf of the State A. H. Heslewood testified that he bought a pint of liquor from the defendant on Saturday, 17 April, 1926, and A. Moye testified that he bought liquor from the defendant at another time. The alleged sales were not related to each other in any way.

The defendant did not testify but introduced as his only witness his father, who said that on 17 April, 1926, the defendant was at home all day and remained most of the time in bed. This was in contradiction of Heslewood's testimony; the witness did not contradict what Moye said.

The defendant was convicted and from the judgment pronounced he appealed to the Supreme Court, assigning error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Travis & Travis and Allen C. Zollicoffer for defendant.

ADAMS, J. The State introduced two witnesses, A. H. Heslewood and A. Moye, each of whom testified that he had bought whiskey from the defendant; the defendant introduced one witness whose testimony contradicted that of Heslewood but did not contradict that of Moye. At the conclusion of the evidence the judge told the defendant's counsel in the presence of the jury that he would instruct the jury to convict the defendant if they found beyond a reasonable doubt that Moye's testimony was true. This remark was repeated in the presence of the jury and in each instance the defendant duly excepted. This was not an

expression of opinion as to the credibility of the witness or as to the defendant's guilt, but the announcement of an intended instruction which was subsequently given as follows: "The witness, A. Moye, testified that he bought a pint of whiskey from the defendant and paid him $2.00 for it. This evidence is not contradicted. The court instructs you that if you believe the evidence of the witness, Moye, beyond a reasonable doubt, you should find the defendant guilty." The defendant suggests that this instruction is erroneous; but there was no other evidence of this transaction and the evidence if believed was susceptible of only one construction, that is, that the defendant made the sale; and under such circumstances similar instructions have repeatedly been sustained. *S. v. Vines,* 93 N. C., 493; *S. v. Winchester,* 113 N. C., 642; *S. v. Riley, ibid.,* 648; *S. v. Woolard,* 119 N. C., 779; *S. v. Hill,* 141 N. C., 769; *S. v. Estes,* 185 N. C., 752; *S. v. Murphrey,* 186 N. C., 113. The principle does not apply where the evidence, if true, is susceptible of more than one deduction. *Fertilizer Works v. Cox,* 187 N. C., 654. We are referred by the defendant to *S. v. Hardy,* 189 N. C., 799, in which upon assignments of error a new trial was awarded. There the instruction, "If you believe the facts as testified you will return a verdict of guilty," was disapproved; but the evidence to which the instruction referred was apparently regarded as open to more than one construction. It is worthy of note that the State's witness in that case did not say directly, but only inferentially, that the man he had met in the road was the defendant, and his subsequent testimony was not necessarily conclusive on that question. In any event, *Hardy's case* cannot reasonably be interpreted as conflicting with the long line of decisions which have upheld the principle now under discussion.

The judge's remark that Moye's testimony was not contradicted did not constitute reversible error. He simply directed the jury's attention to the conflict between the testimony of Heslewood and that of the defendant's only witness and to the want of such inconsistency between the defendant's witness and Moye. The plea put in issue the question of the defendant's guilt and the credibility of the State's evidence; but it could not "contradict" evidence which had not been introduced when the plea was entered. *S. v. Murphrey, supra; S. v. Hardy, supra, p.* 804.

We find nothing in the record which indicates the expression or intimation of an opinion by the presiding judge in violation of Consolidated Statutes, 564, or disregard of the rule which forbids the selection or "singling out" of one witness among many, where the evidence is conflicting, and making his credibility a pivotal or controlling circumstance. *S. v. Rogers,* 93 N. C., 523; *Long v. Hall,* 97 N. C., 286.

We find

No error.

JOHN GARRIS ET AL. v. MATTHEW TRIPP ET AL.

(Filed 29 September, 1926.)

1. Tenants in Common—Deeds and Conveyances—Possession—Title.

Where tenants in common divide the lands held among themselves by deed, the deed so given is for the purpose of severing the tenancy and does not affect the title under which they hold.

2. Same—Husband and Wife.

Two sisters are tenants in common of a tract of land; one sister and her husband releases a one-half interest therein by a deed to the other sister and her husband: *Held*, only the tenancy is secured and no new estate is created.

APPEAL by defendants from *Sinclair, J.*, at April Term, 1926, of the Superior Court of WAYNE County.

D. H. Bland and W. S. O'B. Robinson for plaintiffs.
Dickinson & Freeman for defendants.

ADAMS, J. This case was heard on an agreed statement of facts. Prior to 10 March, 1870, Winnifred Tripp (who before her marriage to Theophilus Tripp was Winnifred Garris), and Mourning Garris, her sister, were the owners in fee and in possession of 40 acres of land allotted to them in the division of their father's estate and subject to the dower interest of their mother. On 10 March, 1870, Theophilus Tripp and his wife, Winnifred Tripp, Mourning Garris, and Smithie Garris, the widow, conveyed this land to John R. Smith in exchange for another tract containing 228 acres, which was conveyed by John R. Smith and his wife to Winnifred Tripp and Mourning Garris. Sometime after 10 March, 1870, and before 27 December, 1871, Mourning Garris married Austin Williams. At the date last named Austin Williams and his wife, Mourning Williams, conveyed to Theophilus Tripp and Winnifred Tripp, his wife, 114 acres (described by metes and bounds), which is one-half of the 228-acre tract; and at the same time Theophilus Tripp and his wife conveyed to Austin Williams and his wife 114 acres, the remainder of the tract. Winnifred Tripp died about 18 years ago and Theophilus Tripp on 6 April, 1924. One child, born to Theophilus Tripp and his wife, died in the lifetime of its mother. The plaintiffs are the heirs of Winnifred Tripp and the defendants are the heirs of Theophilus Tripp. Since the death of Theophilus Tripp the defendants have been in possession of the 114 acres described in the deed executed by Austin Williams and his wife to Theophilus Tripp

and his wife, receiving the rents and profits. The plaintiffs contend that they are the owners in fee and entitled to recover the possession of this land as the heirs of Winnifred Tripp; the defendants contend that they are the owners thereof as the heirs of Theophilus Tripp.

At the trial of the cause it was adjudged that the plaintiffs are the owners and entitled to the immediate possession of the land in controversy; whereupon the defendants excepted and appealed. The judgment must be affirmed. John R. Smith and his wife conveyed the 228-acre tract to Winnifred Tripp and Mourning Garris, who then held the land as tenants in common. It was taken in exchange and evidently in substitution for land which had descended to them from their father. The deeds mutually executed by these tenants and their husbands merely severed the tenancy and did not create a new estate. "It is one of the essentials of the peculiar estate by entireties sometimes enjoyed by husband and wife, that the spouses be jointly entitled as well as jointly named in the deed. Hence if the wife alone be entitled to a conveyance, and it is made to her and her husband jointly, the latter will not be allowed to retain the whole by survivorship. And it matters not if the conveyance is so made at her request, because being a married woman she is presumed to have acted under the coercion of her husband." *Sprinkle v. Spainhour,* 149 N. C., 223. It is therefore manifest that the deed from Williams and his wife to Theophilus Tripp and his wife did not convey an estate by the entirety. *Harrison v. Ray,* 108 N. C., 215; *Carson v. Carson,* 122 N. C., 645; *Harrington v. Rawls,* 131 N. C., 39; *ibid.,* 136 N. C., 65; *Speas v. Woodhouse,* 162 N. C., 66; *Kilpatrick v. Kilpatrick,* 176 N. C., 182, 185.

Affirmed.

B. F. CARR ET AL. v. EUGENIA BIZZELL.

(Filed 29 September, 1926.)

1. Evidence—Declarations—Boundaries—Ante Litem Motam—Interest—Lands—Title.

In an action involving the true boundary line between adjoining owners of land, declarations of a former owner before any dispute arose, made against his interest while the defendant was in possession, who had no motive to falsify the facts declared, and was aware of the effect of his declarations, and the declarant was dead at the time his declarations were offered in evidence, are admissible.

2. Boundaries—Burden of Proof.

The burden of proof is on plaintiff in his action to locate the true dividing line between his own and the defendant's adjoining land.

3. Appeal and Error—New Trials—Newly Discovered Evidence—Motions—Notice.

The movant in the Supreme Court for a new trial for newly discovered evidence, is required among other things, to give his opponent at least ten days previous written notice to enable him to reply, and thus give the court information of the facts, unless upon application the court in its discretion fixes a shorter time.

APPEAL by defendant from *Daniels, J.,* at October Term, 1925, of WAYNE.

Special proceeding to establish the dividing line between adjoining lands of plaintiffs and defendant, with title drawn in issue, both sides claiming the land in dispute by adverse possession.

From a verdict and judgment in favor of plaintiffs, the defendant appeals, assigning errors.

Dickinson & Freeman for plaintiffs.
Sutton & Greene and N. Y. Gulley for defendant.

STACY, C. J. The exceptions addressed to the admission and exclusion of evidence, call for no particular elaboration. They are without substantial merit and cannot be sustained.

The ones mainly stressed on the argument relate to the admission of declarations against interest, made by owners of the land, under whom the defendant claims, while they, the declarants, were in possession of the premises asserting ownership thereof.

It appears that the declarations, quoted by the witnesses, were made before any dispute arose over the boundary line; that they were against the pecuniary or proprietary interests of the declarants, who had no probable motive to falsify the facts declared, and who were cognizant of the meaning and effect of said declarations at the time they were made; and that the declarants are now dead. This rendered the evidence competent. *Roe v. Journegan,* 175 N. C., 261.

The admissibility of such evidence was fully discussed in the case of *Smith v. Moore,* 142 N. C., 277, where it was said in an elaborate opinion by *Walker, J.,* reviewing the authorities on the subject, that declarations against interest, as to facts relevent to the inquiry, are admissible in evidence, even as between third parties, when it appears: (1) That the declarant is dead; (2) that the declaration was against his pecuniary or proprietary interest; (3) that he had competent knowledge of the fact declared; and (4) that he had no probable motive to falsify the fact declared. The rulings in the instant case come squarely within the authorities on the subject.

The trial court instructed the jury that as the plaintiffs were the actors, the burden of proof was on them throughout to establish by the

greater weight of the evidence the location of the true dividing line between the lands of the plaintiffs and the defendant. In this, there was no error. *Hill v. Dalton,* 140 N. C., 9. The burden of proof cannot rest on both parties at the same time. *Speas v. Bank,* 188 N. C., 524; *Tillotson v. Fulp,* 172 N. C., 499; *Garris v. Harrington,* 167 N. C., 86; *Woody v. Fountain,* 143 N. C., 66.

The remaining exceptions are equally untenable.

Upon the call of the case for argument in this Court, 16 September, 1926, the defendant lodged a motion for a new trial on the ground of newly discovered evidence, based on an affidavit taken 4 January, 1926. No notice was given to the opposing side of appellant's intention to make said motion, and for this reason, if no other, the motion must be denied. Speaking to a similar situation in *Herndon v. R. R.,* 121 N. C., 498, *Clark, J.,* said:

"It is proper to say that when a motion for a new trial for newly discovered evidence in this Court is contemplated notice of such motion should be always given the other side and a copy of the affidavits served therewith. The respondent should also serve a copy of his counter-affidavits, if time permits. Thus, there will be no surprise on either party, and the Court will be put in full possession of the facts. The appellant should give this notice at least ten days before the beginning of the call of the district to which the cause belongs, unless the information comes to him after that time, when the Court may shorten the notice and, if necessary, give the respondent time to file counter-affidavits. Code, sec. 595. New trials for newly discovered evidence are not favored in the trial court or on appeal, and the party moving on that ground must not only negative *laches* in himself in discovering the evidence relied on, but must give reasonable notice to the other party of the motion based thereon."

After a careful and painstaking investigation of the record, we are convinced that no reversible or prejudicial error was committed on the trial of the cause. The verdict and judgment will be upheld.

No error.

R. L. BRINSON v. E. G. MORRIS ET AL.

(Filed 29 September, 1926.)

1. Pleadings—Answer—Issues—Statutes—Suits—Cloud on Title—Equity.

Where the complaint in a suit to remove a cloud upon plaintiff's title to land (C. S., 1743), alleges that the plaintiff is the owner of the *locus in quo,* and asks for a reformation of his deed to the lands to show that by

mutual mistake the name of the grantee therein was that of a private business enterprise he was conducting, and that accordingly the defendants claimed an interest therein, an allegation in the answer in reply that the defendant had no knowledge or information sufficient to form a belief as to whether the plaintiff was conducting a business in the name of the grantee in the deed, is sufficient under our statute to raise the issue, and a judgment in plaintiff's favor upon the pleadings is reversible error. C. S., 519.

2. **Pleadings — Issues — Demurrer Ore Tenus in the Supreme Court — Equity—Cloud on Title.**

Where the complaint in a suit to remove a cloud upon plaintiff's title to the *locus in quo* alleges that the defendants claimed an interest therein under a deed which plaintiff seeks to have reformed, and the defendants deny that they have no claim thereto, it is sufficient to raise the issue at least inferentially, and defendants' demurrer *ore tenus* in the Supreme Court to the sufficiency of the complaint to state a cause of action, will be denied.

APPEAL by defendants from *Cranmer, J.*, at August Term, 1926, of CHATHAM.

CIVIL action to reform deed and remove defendants' claim as cloud on plaintiff's title.

From a judgment on the pleadings in favor of plaintiff, the defendants appeal, assigning error.

Siler & Barber for plaintiff.
J. A. Spence for defendants.

STACY, C. J. Plaintiff alleges that he is a resident of Guilford County, engaged in the business of distributing oil and gasoline throughout various sections of North Carolina under the style name of "Southern Oil Company"; that on 16 March, 1925, he contracted to buy, and did buy, from the defendants a lot or parcel of land situate in the town of Pittsboro, and took a deed therefor in the name of Southern Oil Company, as grantee, when the same should have been made to "R. L. Brinson, trading and doing business under the style name of Southern Oil Company," in accordance with the intention of the parties; and that the defendants are now claiming an interest in the land, by reason of said defective deed. Wherefore, plaintiff brings this suit to have said deed corrected and to remove the defendant's claim to the land as a cloud on plaintiff's title. C. S., 1743. See *Robinson v. Daughtry*, 171 N. C., 200.

The defendants in their answer admit that R. L. Brinson is a resident of Guilford County, but say that they have no "knowledge or information sufficient to form a belief" as to whether he is "conducting and

operating his business under the style name of Southern Oil Company." This, in effect, was a statutory denial of the fact, and sufficient to require proof of the allegation. C. S., 519; *Person v. Leary,* 127 N. C., 114. It was error, therefore, to render judgment for the plaintiff on the pleadings.

On the argument in this Court the defendants demurred *ore tenus,* on the ground that the complaint does not state facts sufficient to constitute a cause of action against the defendants. C. S., 511. But this must be overruled. It is alleged, inferentially at least, if not directly, that the defendants claim an interest in the land covered by the deed above mentioned. In answer to this allegation, the defendants say: "It is denied that the defendants have no claim thereto."

Let the cause be remanded, to the end that further proceedings may be had as the law directs and the rights of the parties require.

Error.

EVERETT ET ALS. v. STATON, RECEIVER.

(Filed 29 September, 1926.)

1. **Banks and Banking—Directors—Officers — Guarantor of Payment—Equity—Subrogation.**

The directors of a bank who have individually guaranteed the indebtedness of the bank held by another or foreign bank, to be entitled to legal subrogation to the excess collaterals held by the creditor bank as security, must show a payment of such indebtedness or a part thereof, and claim only to the extent such payment has been made.

2. **Same—Conventional Subrogation.**

And to be entitled to conventional subrogation, they must show an agreement, duly passed and binding upon the bank, fairly made, and not tainted by fraud, bad faith or undue advantage, that the excess securities held by the creditor bank should inure to their benefit as guarantors if they would be in excess of the indebtedness they had guaranteed.

3. **Same—Corporations—Meetings—Corporate Action.**

In order for the directors of the bank to have by equitable conventional subrogation an interest in the surplus collateral of a creditor bank who held their individual guaranty for the payment by the debtor bank, they must show a corporate action by resolution duly passed giving them this right by which they have acquired a lien upon such surplus collateral to protect them in their guaranty.

4. **Same—Evidence.**

The mere fact that the president or other officials of the debtor bank understood that the individual directors who should give their personal written guaranty to the creditor bank would be protected by the collaterals

of the debtor bank pledged to the payment of the debt so guaranteed, and that the individual directors so understood it, does not alone amount to such corporate assignment of the collaterals as would entitle the guarantors to conventional subrogation thereof.

5. Same—Record of Meeting.

As to whether it is necessary for a record of a meeting of the board of directors of a bank to be kept wherein a conventional assignment was given to its directors guaranteeing its obligations to another bank, in the collateral thereto hypothecated by the debtor bank (3 C. S., 221(b). *Quære?*

CIVIL ACTION before *Calvert, J.*, at March Term, 1926, of MARTIN.

The Peoples Bank of Williamston was indebted to twelve banks in various amounts, aggregating $389,069.74. This indebtedness of the Peoples Bank was secured by collateral owned by the bank in the form of bills receivable, aggregating $624,431.16. These correspondent banks refused to advance any more money until further security or guaranty was assured. Plaintiffs, among others, were directors of the Peoples Bank. In order to meet the emergency twenty-one directors of the Peoples Bank executed and delivered a written guaranty to each of said correspondent banks, guaranteeing to each of said banks payment of any indebtedness held by such bank against the Peoples Bank, together with any indebtedness which might thereafter exist or arise by reason of any credit furnished or extended to said Peoples Bank. These guaranties authorized the creditor banks in their discretion "from time to time at any time surrender, exchange or substitute at its pleasure any collateral that it now holds or may from time to time hold as security for such indebtedness or any part thereof."

Thereafter, the Peoples Bank became insolvent and the defendant Staton was appointed receiver thereof.

Eight of the creditor banks have been paid in full by the receiver of the Peoples Bank, and the excess collateral which these eight creditor banks held, belonging to the Peoples Bank, has been returned to the receiver. The other four creditor banks have not been paid, the amount due them being $38,330.64, and they have brought suit on the guaranties. The plaintiffs contend that it was agreed at the time of signing said guaranties by said directors that all the collateral owned by the Peoples Bank and in possession of creditor banks should be exhausted before the guarantors should become liable on said guaranties, and that by reason of such agreement the collateral returned to the receiver of the Peoples Bank by the eight creditor banks belongs to the plaintiffs as directors, and should be held for the purpose of indemnifying them against loss arising upon claims of the four creditor banks still holding unpaid claims against the Peoples Bank.

The defendant contends that this excess collateral does not belong to the plaintiffs or the directors of said bank personally, but that it belongs to the general fund of the bank with which to pay depositors and other creditors.

At the conclusion of plaintiffs' evidence the trial judge nonsuited the plaintiffs, from which judgment plaintiffs appealed.

Stubbs & Stubbs, B. A. Critcher, and Ward & Grimes for plaintiffs.
Dunning & Moore and Stephen C. Bragaw for defendant.

BROGDEN, J. The question presented by the record is whether or not the plaintiffs are entitled to the excess collateral now in the hands of defendant receiver by virtue of the equity of subrogation.

Subrogation is of two kinds, to wit, legal and conventional. "Legal subrogation is based upon payment and exists where one who has an interest to protect or is secondarily liable makes payment, while conventional subrogation, so named from the convention or agreement of the civil law, is founded upon the agreement of the parties, which really amounts to an equitable assignment." *Joyner v. Reflector Co.*, 176 N. C., 274; *Bank v. Bank,* 158 N. C., 250; *Publishing Co. v. Barber,* 165 N. C., 488.

The basis of legal subrogation is payment either in full or *pro tanto* to the creditor or otherwise satisfying the creditor so that the creditor has nothing further to demand. *Publishing Co. v. Barber,* 165 N. C., 488; *Grantham v. Nunn,* 187 N. C., 394; *Trust Co. v. Godwin,* 190 N. C., 517.

Therefore, it appearing that the plaintiffs have paid nothing to any creditor by reason of said guaranty or otherwise, they are not entitled to legal subrogation because they have neither discharged any debt of the Peoples Bank in full or *pro tanto.*

The plaintiffs, however, contend that they are entitled to conventional subrogation by reason of the fact that at the time of signing said guaranty they had an agreement with the debtor, to wit, Peoples Bank, that all collateral placed by said Peoples Bank with its creditor banks should be exhausted or held for the protection of plaintiffs and other directors so signing said guaranties. It will be observed that the collateral now in controversy was not returned to the receiver of the Peoples Bank by the four banks now having unpaid claims; or, in other words, the collateral in controversy was never in possession of the four creditor banks now asserting a claim against the plaintiffs on said guaranties.

The decision of the merits of the controversy resolves itself into a determination as to whether or not the plaintiffs had a valid and binding agreement with the Peoples Bank constituting a lien on collateral, or an assignment thereof.

Unquestionably, directors of a bank can make a valid and binding contract with the bank if such contract is entirely free from any taint of fraud, bad faith, or undue advantage. The defendant does not allege that any such defects were present in the transaction, but that the plaintiffs made no valid agreement with the bank for the reason that when such alleged agreement was made the directors were acting separately, individually, and not as a corporate body or exercising corporate functions, and therefore the alleged agreement was never legally adopted or made by the Peoples Bank.

A brief summary of the evidence is, perhaps, necessary to develop this aspect of the law of the case. The secretary and vice-president of the Peoples Bank, who was also a stockholder and director at the time the guaranties were executed by the plaintiffs and other directors, testified that "it was thoroughly understood by every one that signed it (guaranty) that all collateral amounting to about $1,000,000.00, we owed about $600,000.00, that all this collateral was to be exhausted before any man who signed it (guaranty) would be called on to pay a cent. In consequence of this all the guaranties were signed. This was not done at the directors meeting, but each man that signed it had that understanding. . . . No resolution was ever passed by the board of directors nor was there any agreement in writing among the directors to that effect. . . . No meeting was called to consider the matter of appropriating the collateral and no resolution was adopted by the board of directors to that end, but it was agreed among us. . . . There is no record of formal action taken by the board of directors as a body. I do not recall any resolution voted on and no action of the board in any other way, only informally talking about it."

Another director testified that "there was a meeting in the directors room of the bank for the consideration of guaranties of the indebtedness of the bank. The president of the bank was present and I think the vice-president was present also. We had a pretty good meeting. The statement was made . . . that this collateral stood between the creditors of the bank and the guarantors; that they would be exhausted before we were called upon. I put the question to Mr. Staton (the president), that I understood it that way and he said that was the way he understood it. . . . There was no resolution offered and no formal action by the board and no minutes made of the proceedings. There was a discussion among us as to where we would stand."

There was other testimony to the same effect.

Upon the record, as presented, we are of the opinion that no valid agreement was made by the corporation assigning the collateral in controversy or giving a lien thereon to the plaintiffs and the other directors.

"The members of a corporation cannot, separately and individually, give their consent in such manner as to bind it as a collective body, for, in such case, it is not the body that acts; and this is no less the doctrine of the common than of the Roman Civil Law." *Duke v. Markham,* 105 N. C., 131.

The proposition involved in the appeal is not one of form but whether or not there was valid corporate action in creating the lien or assignment of practically the total liquid assets of the bank. The plaintiffs cannot be deprived of their right by reason of failure of the proper officer to actually make a written minute or record of the proceedings for the reason "that proceedings of a corporate meeting of stockholders or directors are facts, and they may be proved by parol testimony where they are not so recorded." *Bailey v. Hassell,* 184 N. C., 459.

We are not inadvertent to the requirement of C. S., vol. 3, sec. 221 (b), requiring that minutes shall be kept of all meetings of the board of directors of banks. However, there is no objection appearing in the record to the testimony of the plaintiff and other witnesses as to what transpired among the directors about this transaction.

The final inquiry, then, is how shall corporate action as distinguished from individual action be exercised?

While the law has never required a strict adherence to form in the exercise of corporate function, it does regard, as essential, some expression of the collective body. This expression of the collective body or corporate body must be exercised by a resolution and this resolution must be duly adopted. "The courts of this country have generally adopted the common-law principle that, if an act is to be done by an indefinite body, the law, resolution or ordinance authorizing it to be done is valid if passed by a majority of those present at a legal meeting." *Cotton Mills v. Commissioners,* 108 N. C., 678; *Hospital v. Nicholson,* 189 N. C., 44; *Respass v. Spinning Co.,* 191 N. C., 809.

To the same effect is the principle declared in *Pinchback v. Mining Co.,* 137 N. C., 181, in these words: "While it is true, as contended by plaintiffs, that unless expressly required by the by-laws, it is not necessary that a written record of the proceedings of the stockholders' meeting be made, and that they may be proven by parol. It is also true that before the solemn acts of a corporation, especially when contractual, can be set aside, it must appear that a meeting was held and that the stockholders acting as such voted to do so."

This principle finds strong support in the case of *Asbury v. Mauney,* 173 N. C., 457, in this language: "It is stated in the minutes that a motion to this effect was made and seconded, but it does not appear that it was voted upon or adopted, and this omission has particular significance in view of the evidence of all of the stockholders who were

present at the meeting except the plaintiff, that after the motion was made and seconded, objection was raised, and it never came to a vote, and that the plaintiff, who was examined as a witness in his own behalf, did not contradict them, but contented himself with stating that the minutes contained a true account of the meeting, and that they were read over to the stockholders."

We hold, therefore, that upon the facts appearing in the record and the principle of law applicable thereto, the agreement relied upon by the plaintiff was never legally adopted as a valid exercise of corporate function. Hence, the equity of subrogation is not available to plaintiffs upon this record, and the judgment is accordingly

Affirmed.

JAMES A. EVERETT AND F. L. GLADSTONE v. J. G. STATON, RECEIVER OF PEOPLES BANK OF WILLIAMSTON.

(Filed 29 September, 1926.)

1. Banks and Banking—Corporations—Contracts — Shareholders — Officers—Consideration.

While personal dealings between the shareholders and officers of the bank will be carefully scrutinized, they will be upheld when the transactions are made in good faith and the bank has been benefited thereby in the usual course of its authorized banking transactions.

2. Same—Subrogation—Receivers—Debtor and Creditor.

Where a stockholder and director of a bank have in good faith loaned their Liberty Bonds to it to enable it to get an extension of the time of payment of its note it had given to another bank, with collaterals hypothecated for its payment, and the creditor bank has sold these bonds with some of the other collaterals and discharged the extension note, and has turned the balance of the collaterals hypothecated to the receiver of the borrowing bank, which has since become insolvent: *Held*, to the extent of the unused collaterals, the officials who have so loaned their bonds are entitled to legal subrogation as against the claims of the other or general creditors of the bank represented by the receiver.

3. Same—Insolvency—Evidence.

Under the facts of this case: *Held*, the mere fact that the borrowing bank afterwards went into the hands of a receiver did not affect the *bona fides* of the stockholder and director who had loaned it their individual bonds in order to enable it to obtain an extension of the time of payment of a note for money borrowed by it from another bank.

4. Same—Legal Subrogation—Definition.

Legal subrogation is defined to be "an equity called into existence for the purpose of enabling a party, secondarily liable, but who has paid the debt, to reap the benefit of any securities or remedies, which the creditors may hold as against the principal debtor, and by which the party paying may be made whole."

5. Same — Debtor and Creditor — Unsecured Claims — Distribution of Assets.

While a stockholder or director of a bank may be entitled to subrogation to the rights of their bank to whom they have loaned their personal collateral to enable it to obtain an extension of time of payment on a note it had given to another bank, to the extent of the borrowing bank's unexhausted collateral it pledged to the note, as to the other or general collateral of the borrowing bank, since becoming insolvent and in a receiver's hands, their relation is that of general creditors, and they are only entitled to the proceeds in its distribution among the general or unsecured creditors of the insolvent bank.

APPEAL by both plaintiffs and defendants from *Calvert, J.*, at March Term, 1926, of MARTIN. No error.

On 21 August, 1920, plaintiffs loaned to the Peoples Bank of Williamston, N. C., Liberty Bonds of the par value of $50,850, to be hypothecated by said bank with the Coal and Iron Bank of New York, as additional security for its indebtedness to said Coal and Iron Bank; the Peoples Bank had theretofore deposited with said Coal and Iron Bank as collateral security for said indebtedness, securities, owned by it, of the aggregate par value of $114,076.44; in June, 1922, the Peoples Bank was declared insolvent, and defendant, J. G. Staton, was duly appointed as its receiver; upon default in the payment of the indebtedness to it of the Peoples Bank, the Coal and Iron Bank sold said Liberty Bonds, and applied the proceeds of said sales as a payment on said indebtedness; the Coal and Iron Bank thereafter realized from the securities owned by the Peoples Bank, and held by it as security for said indebtedness, a sum sufficient to pay off and fully discharge the balance due on said indebtedness, after the application of the proceeds of the sale of the Liberty Bonds; it then delivered to defendant receiver all said securities, remaining in its hands, the par value of said securities so delivered to the receiver being $49,506.43; the said receiver now holds said securities, or the proceeds of their collection, or sale.

Since the sales of the said Liberty Bonds by the Coal and Iron Bank, each plaintiff has realized from certain collaterals and securities deposited with him at the time of the loan of said Liberty Bonds, as security for their return, large sums of money, which he has in hand to indemnify him on account of the loss he has sustained from the failure of the Peoples Bank to return said Liberty Bonds, because of their sale by the Coal and Iron Bank; said sums of money are not sufficient, however, to fully reimburse plaintiffs for their loss. Each plaintiff now has a claim against the receiver for the amount due him on account of his loss sustained by the sale of said Liberty Bonds. Ob-

jection as to misjoinder of parties or cause of action is expressly waived by defendant in his brief filed in this Court.

Upon the foregoing facts, admitted in the pleadings, and found by the jury, judgment was rendered, decreeing that plaintiffs have an equitable right and title to the collateral returned to the defendant receiver of the Coal and Iron Bank, or to the proceeds of the same now in his hands; and that plaintiffs are entitled to be paid out of said collaterals or proceeds, prior to payment of the general creditors of the Peoples Bank, in the same ratio as the amounts received by the Coal and Iron Bank from the sale of their Liberty Bonds, bear to each other. Defendants excepted to said judgment, for that it adjudges that plaintiffs are entitled to a preference and priority in payment over general creditors of the Peoples Bank with respect to said collaterals and proceeds thereof.

Plaintiffs moved for judgment that the amount found to be due to each of plaintiffs, after an accounting in accordance with the judgment aforesaid, be declared a preferred claim against the assets of the bank, now or hereafter in the hands of the receiver, and that the receiver be directed to pay said amounts, out of the general assets of the bank, prior to payment of any dividend to general creditors out of said assets. This motion was denied, and plaintiffs excepted.

Both plaintiffs and defendant appealed to the Supreme Court.

Stubbs & Stubbs, B. A. Critcher, Ward & Grimes for plaintiffs.
Dunning & Moore, Stephen C. Bragaw for defendant.

CONNOR, J. The fact that plaintiff, F. L. Gladstone, was a stockholder, and plaintiff, James A. Everett, was a stockholder and director of the Peoples Bank at the time they loaned their Liberty Bonds to said bank, to be hypothecated with the Coal and Iron Bank, a creditor of the Peoples Bank, as security, upon the facts on this record, does not affect their rights, if any, to relief, under the equitable principle of subrogation invoked by them in this action. The transaction was not for their benefit, but for the benefit of the bank. The good faith, which the law requires in transactions between stockholders and directors and the corporation, is apparent on the admitted facts; indeed, it is not questioned on the record. Plaintiffs took no advantage of their relations to the bank, to secure personal benefits; rather it must be said that the bank, by reason of such relations, induced plaintiffs to loan their Liberty Bonds to it for its benefit. The mere fact that this bank, in August, 1920, desired to borrow Liberty Bonds to be used as collateral security for its indebtedness held by a New York bank did not indicate that the bank was then insolvent; the bank continued business until June, 1922; it was then declared insolvent.

"There is nothing to hinder a director from loaning money and taking liens on the corporate property to secure him. If he can do that, he can lend his credit by indorsing its paper in order to obtain needed cash, and secure himself upon the corporation's property. Such transactions are looked upon with suspicion, and strict proof of their *bona fides* is required." *Caldwell v. Robinson,* 179 N. C., 518; *Wall v. Rothrock,* 171 N. C., 388. We can perceive no reason why this principle should not be applied to enable a stockholder or director, who, in good faith, loans his securities to the corporation, to be hypothecated by the corporation as additional security for its then existing indebtedness, secured by collaterals owned by the corporation, and then in the hands of the creditor, to call to his aid the equitable principle of subrogation, with respect to the collaterals, owned by the corporation and not exhausted by the creditor, who has however applied the securities of the stockholder or director to the payment, in full or *pro tanto,* of the corporation's debt, thus releasing the collaterals of the corporation. By means of the loan of plaintiffs' bonds, the bank secured what it desired, to wit, an extension of the date on which its indebtedness became due.

The Coal and Iron Bank held as security for the indebtedness due to it by the Peoples Bank, first, securities owned by said Peoples Bank; second, Liberty Bonds, owned by plaintiffs, but loaned to the Peoples Bank, to be hypothecated with the Coal and Iron Bank, as additional security for said indebtedness; the Coal and Iron Bank, upon default in the payment of the indebtedness, applied, first, the proceeds of the sale of the Liberty Bonds, as a payment on the indebtedness; next, a sufficient sum derived from the collaterals owned by the Peoples Bank, to discharge the debt, leaving a large amount of said collaterals, unexhausted. This resulted from the application of the Liberty Bonds to said indebtedness. It is clear that plaintiffs are entitled to the unexhausted collaterals, returned to the receiver, upon the just and well-settled principle of legal subrogation, which has been defined as "an equity called into existence for the purpose of enabling a party, secondarily liable, but who has paid the debt, to reap the benefit of any securities or remedies which the creditors may hold as against the principal debtor and by the use of which the party paying may thus be made whole." Bispham's Equity (6 ed.), secs. 335 and 336; *Whitford v. Lane,* 190 N. C., 343; *Joyner v. Reflector Co.,* 176 N. C., 274; *Brown v. Harding,* 170 N. C., 253. There is no error upon defendant's appeal.

Nor is there error upon plaintiffs' appeal. It is true that the bank agreed to return the Liberty Bonds to plaintiffs; but it was also agreed by plaintiffs that these bonds should be hypothecated with the Coal and Iron Bank, and that said Coal and Iron Bank should have the power to sell them, upon default in the payment of the amount due it by the

Peoples Bank. We are unable to perceive upon what principle it can be successfully contended that plaintiffs are entitled to priority in the payment of their claims out of the general assets of the bank. With respect to said claims, the relation between plaintiffs and the bank was that of creditor and debtor, and plaintiffs can only share in the assets of the bank *pro rata* with general creditors, after they have received the proceeds of the sale or collection of the specific securities to which they are entitled, by subrogation, in accordance with the judgment rendered. The principle upheld and applied in *Corporation Commission v. Bank,* 137 N. C., 697, is not for the benefit of the bank, but for the protection of general creditors, upon the principle that equality is equity. Plaintiffs' assignment of error cannot be sustained. The judgment is affirmed. There is

No error.

STATE v. LUDLOW LEE AND RONEY B. LEE.

(Filed 29 September, 1926.)

1. Instructions—Appeal and Error.

If construing an instruction of the jury contextually in its related parts it is sufficient to inform the jury correctly as to the principles of law arising upon the evidence in the case, it will not be held for reversible error because construed disjointedly it may be the subject of judicial criticism.

2. Criminal Law—Assault—Indictment—Verdict—Lesser Degree of the same Offense—Evidence—Instructions.

While it is the better practice for the jury to specify which of the several offenses they find the defendant guilty of, when less offenses may be found against him under the indictment and evidence in the case, a general verdict of guilty will not be held for error, when it is capable of being correctly construed with reference to the greater offense charged in the indictment and supported by the evidence in the case, under a correct instruction of the law relating to it.

ADAMS, J., concurring.

APPEAL by defendants from *Sinclair, J.,* at May Term, 1926, of HARNETT.

Criminal prosecution, tried upon an indictment charging that the defendants, with force and arms, did, on 7 August, 1925, "unlawfully, wilfully, maliciously and feloniously, in a secret manner, by waylaying and concealing themselves in the darkness of the night, commit an assault, with a deadly weapon, to wit, a gun, upon one Julius McLeod, shooting said McLeod through the body and inflicting serious and permanent injury, with intent then and there the said McLeod to kill and murder," etc.

Verdict: Guilty.

Judgment: Imprisonment in the State's prison, at hard labor, for a term of not less than five and not more than ten years.

Defendants appeal, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Young & Young and Clifford & Townsend for defendants.

STACY, C. J. It is provided by C. S., 4213, the statute under which the defendants were indicted and convicted, that if any person shall commit an assault and battery upon another (1) maliciously, (2) with a deadly weapon, (3) in a secret manner, by waylaying or otherwise, notwithstanding the person so assaulted may have been conscious of the presence of his adversary, (4) with intent to kill such other person, he shall be guilty of a felony and shall be punishable by imprisonment in jail or in the State's prison for not less than twelve months nor more than twenty years, or by a fine of not exceeding two thousand dollars, or both, in the discretion of the court.

The prosecuting witness testified that just after dark on the night in question, he was walking along the public highway approximately sixty yards from his home, when, attracted by the growling of his dog, he looked over into the cotton patch by the road and saw the defendant, Ludlow Lee, who had previously been hiding between two rows of cotton, rise from his squatting position, with a shot gun in his hands, and fire directly at the prosecuting witness, inflicting serious and permanent injury by shooting him in the face and shoulders. Immediately thereafter he saw the defendant, Roney B. Lee, who was with Ludlow Lee at the time, and who had also been hiding in the cotton patch, rise up with gun in hand and fire in the air.

The defendants denied having anything to do with the shooting, and introduced evidence tending to show that they were elsewhere at the time.

The evidence was plenary on both sides. It was sufficient on behalf of the State to warrant a conviction, and on behalf of the defendants to warrant an acquittal. The case was peculiarly one for the jury under proper instructions from the court.

All the exceptions are directed to the charge, and while some of his Honor's expressions, standing alone, may be objectionable, yet, taken as a whole, we are constrained to believe that the charge is free from reversible error.

The charge, as has so often been said, is to be considered contextually and not disjointedly. *In re Hardee,* 187 N. C., 381; *Milling Co. v.*

Highway Commission, 190 N. C., p. 697, and cases cited. Viewed in this way, we think the validity of the trial should be sustained.

There was a motion, made in this Court, to arrest the judgment because of the alleged insufficiency of the verdict, in that it does not specify of which grade of the offense charged the jury convicted the defendants, it appearing that one of four verdicts was permissible under the indictment, the evidence and the charge of the court, and the jury simply returned a verdict of "guilty."

The decisions in the several jurisdictions, having statutes similar to ours, C. S., 4640, permitting a conviction of a less degree of the same offense charged in the bill of indictment, when warranted by the evidence, are not in unison. *Moody v. State,* 52 Tex. Crim. Rep., 232; *Kinchen v. State,* 188 S. W. (Tex.), 1004; *Estes v. State,* 55 Ga., 131; *Com. v. Flagg,* 135 Mass., 545; *S. v. Smith,* 18 S. C., 149; 27 R. C. L., 856. However, the exact question was decided by this Court in the case of *S. v. Barnes,* 122 N. C., 1031, and that decision is controlling on the present record. There, *Clark, J.,* speaking for the Court, said: "While the statute (Laws 1885, ch. 68) permits a verdict for an assault when it is embraced in the charge of a greater offense, as rape or other felony, a verdict simply of guilty and not specifying a lower offense is a verdict of guilty of the offense charged in the indictment."

On authority of the decision in *Barnes' case,* the motion in arrest of judgment must be overruled.

No error.

ADAMS, J., concurring: The defendants are indicted for a malicious assault committed in a secret manner in breach of C. S., 4213, which reads as follows: "If any person shall in a secret manner maliciously commit an assault and battery with any deadly weapon upon another by waylaying or otherwise, with intent to kill such other person, notwithstanding the person so assaulted may have been conscious of the presence of his adversary, he shall be guilty of a felony and shall be punished by imprisonment in jail or in the penitentiary for not less than twelve months nor more than twenty years, or by a fine not exceeding two thousand dollars, or both, in the discretion of the court." Section 4214 relates to an assault with a deadly weapon with intent to kill resulting in injury, the language being: "Any person who assaults another with a deadly weapon with intent to kill, and inflicts serious injury not resulting in death, shall be guilty of a felony, and shall be punished by imprisonment in the State prison or be worked on the county roads for a period not less than four months nor more than ten years." There are other statutes which provide that on a trial for rape, or for other felony, when the crime charged includes an assault against

the person, it shall be lawful for the jury to acquit of the felony and to find a verdict of guilty of an assault against the person indicted if the evidence warrants such finding; and that upon the trial of any indictment the defendant may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime. C. S., 4639, 4640.

In the present case the trial judge instructed the jury that they might convict the defendants of the crime charged in the indictment (sec. 4213), or of an assault with a deadly weapon with intent to kill, but not in a secret manner (sec. 4214), or of an assault with a deadly weapon. The jury returned a general verdict of guilty and the defendants were sentenced to hard labor in the State prison for a term of not less than five and not more than ten years.

In *S. v. Barnes,* 122 N. C., 1031, the defendant was indicted for an assault with intent to commit rape, and on his appeal the Court observed: "While the statute permits a verdict for an assault where it is embraced in the charge of a greater offense, as rape or other felony, a verdict simply of guilty and not specifying a lower offense is a verdict of guilty of the offense charged in the indictment." In the preceding paragraph of the opinion it is said: "There is only one count in the indictment, and it is unnecessary to notice the authorities cited as to general verdicts rendered on a bill charging offenses punishable differently."

I do not think that section 4214 can properly be construed as a lesser degree of the offense denounced in section 4213, as an assault with a deadly weapon may be, because it is a separate and distinct statutory felony; but, there being only one count in the indictment, let me concede that the defendants could have been convicted under the former section for the reason that the language of the indictment is sufficient to embrace this offense. This granted, I am impressed with the expediency and wisdom, if not the necessity, of requiring juries in cases of this character to specify the particular charge on which the verdict is returned. It is the better practice, as it makes for certainty and gives assurance to the Court. Here the punishment prescribed is different in each of the three crimes of which the defendants may have been convicted: (1) imprisonment in jail or in the penitentiary for not less than twelve months nor more than twenty years, or by a fine not exceeding two thousand dollars, or both, in the discretion of the court; (2) imprisonment in the State prison or to be worked on the county roads for a period not less than four months nor more than ten years; (3) fine or imprisonment or both in the discretion of the court. I do not say that the verdict is fatally defective, but I think that under the

conditions disclosed the judge should have been definitely informed as to which of the three offenses the verdict was intended to apply. The motion in arrest of judgment was not made in the trial court, and of course was not considered by the presiding judge; but the return of a general verdict caused the motion to be lodged in this Court.

S. T. HOOKER v. J. B. HARDEE AND LEON T. HARDEE.

(Filed 29 September, 1926.)

Bills and Notes—Negotiable Instruments—Fraud—Burden of Proof.

Where the holder of a note alleges he is the holder in due course, and there is allegation in reply with evidence that he acquired with knowledge of payee's fraud, the burden is on the holder in his action on the note to show he was an innocent purchaser for value. C. S., 3033, 3036, 3038, 3040.

APPEAL by plaintiff from *Nunn, J.*, at April Term, 1926, of PITT. No error.

Action upon note executed by defendants, payable to order of the Atlantic Coast Realty Company. Plaintiff alleges that he is the holder in due course of said note. This allegation is denied in the answer of defendants, who further allege that the execution of said note was procured by the fraud of payee, and that plaintiff had full knowledge of such fraud at the time he acquired said note. The jury having found that defendants are not indebted to plaintiff, as alleged in the complaint, judgment was rendered that plaintiff take nothing by his action. From this judgment plaintiff appealed to the Supreme Court.

J. C. Lanier for plaintiff.
F. G. James & Son for defendants.

PER CURIAM. There was evidence, offered by defendants tending to show that the title of payee, by whom plaintiff alleged the note was negotiated to him, was defective, in that its execution was procured by the fraud of said payee, C. S., 3036; plaintiff contended that such defense was not available as against him, for that he is a holder of said note in due course. The presumption, by virtue of C. S., 3040, that plaintiff, as holder of said note was a holder in due course, and therefore held the note free from any defect in the title of the payee, C. S., 3038, did not apply, upon the finding by the jury, from the evidence, that the title of payee was defective as alleged by defendants. The burden was upon plaintiff to prove that he acquired title as a holder in

due course, C. S., 3040. He was therefore required to prove that he took the note, by indorsement, of the payee, upon the conditions set out in C. S., 3033. See citations under respective sections of Consolidated Statutes.

His Honor so instructed the jury. Assignments of error based upon exceptions to the charge cannot be sustained.

We have examined the exceptions to the admission of evidence tending to show the circumstances under which the note was executed by defendants and transferred to plaintiff. This evidence was competent to sustain defendants' allegations that the execution of the note was procured by fraud of the payee, and that plaintiff took the note with full knowledge of such circumstances. The exceptions cannot be sustained. Judgment affirmed. There is

No error.

GEORGE L. MESKER & COMPANY v. C. B. WEST AND E. H. MENEFEE, TRADING AS WEST & MENEFEE.

(Filed 29 September, 1926.)

1. Contracts—Vendor and Purchaser—Delivery—Reasonable Time.

Where a contract to deliver goods does not specify the time thereof, and the seller is advised that the use by the purchaser required promptness to be binding on the purchaser, they must be delivered to the seller within a reasonable time to comply with the contract.

2. Appeal and Error—Briefs—Assignments of Error—Objections and Exceptions.

Assignments of error in appellant's brief must conform to the rule of court requiring that they be based on exceptions duly noted.

APPEAL by defendants from *Nunn, J.*, at April Term, 1926, of PITT. No error.

Action to recover purchase price of goods sold and delivered. From judgment upon verdict defendants appealed to the Supreme Court.

W. A. Darden for plaintiffs.
Blount & James for defendants.

PER CURIAM. On 26 June, 1922, plaintiffs accepted an order from defendants for metal, fireproof doors, to be manufactured in accordance with specifications furnished by defendants and shipped to defendants at Stantonsburg, N. C., where defendants were engaged as contractors in the erection of a school building. There had been an extended correspondence between plaintiffs and defendants, with respect

to said order, the first letter having been written by defendants on 8 May, 1922. The order was not given, definitely and finally, until 22 June, 1922. While defendants stated in this letter that they would need the doors in the next few days, and plaintiffs, in their letter accepting the order, replied that they hoped to receive from the factory, within the next few days, the shipping date of the goods, no definite time for the shipment of the doors was agreed upon. The doors were delivered by plaintiff to a common carrier for shipment to defendants on 15 July, 1922. They did not arrive at Stantonsburg until October, 1922. Defendants have filed claim with the railroad company for loss on account of delay in transportation.

Defendants excepted to instructions in the charge of the court that under the terms of the contract plaintiffs were required to ship the doors within a reasonable time from the date of the acceptance of the final order and not on any specific date; that if the jury found that the goods were delivered by plaintiffs to the common carrier for shipment to defendants, within such reasonable time, they should answer the issue in accordance with the contention of plaintiffs.

Assignment of error number two does not comply with the Rules of this Court, in that said assignment is not based on specific exceptions appearing in the case on appeal. Rule 19(3). Defendants assign as error "that the court repeatedly instructed the jury that the plaintiffs were only required to make delivery of the doors within a reasonable time after receipt of the order, notwithstanding that there was a specific time within which plaintiffs agreed to make delivery, and time was of the essence of the contract." We fail to find in the contract, as contained in the letters, any agreement on the part of plaintiffs to ship the doors within a specific time. *Leak v. Covington,* 99 N. C., 559. We have, however, examined exceptions upon which the assignment of error is apparently based. They cannot be sustained. There is

No error.

JAMES E. WILSON v. J. K. BEASLEY AND WILLIE BEASLEY.

(Filed 29 September, 1926.)

Appeal and Error — Reference — Objections and Exceptions — Rules of Court.

On appeal to the Supreme Court from the action of the Superior Court judge in passing upon the report of a referee, the facts found and the conclusions of law by the lower court must be regularly stated with the exceptions thereto in the record of the case on appeal. Rule 19(3), 21, 185 N. C., pp. 794, 795.

RAPER *v.* COLEMAN.

APPEAL by defendants from *Lyon, J.*, at January Special Term, 1926, of JOHNSTON. Affirmed.

E. S. Abel, James Raynor and Clifford & Townsend for plaintiff.
James Best for defendants.

PER CURIAM. This Court will not review exceptions to a referee's report unless they are passed upon by the court below, and the rulings of the court below are especially assigned as error in the transcript on appeal to the Supreme Court.

Exceptions and assignments of error relied upon on appeal to the Supreme Court should be taken and stated in the record to findings of fact and conclusions of law made by the court below. Rules of Practice in the Supreme Court, Rule 19(3) and 21, 185 N. C., p. 794-5.

On the present record this was not done. There is no evidence in the record. From the record the only assignment of error from the Rules that we can consider is to the judgment of the court below, to which exception and assignment of error is made to this Court. This was a consent reference. As to reserving trial by jury in compulsory references, see *Jenkins v. Parker, ante,* 188.

From the findings of fact by the court below, we can discover no reversible or prejudicial error on the record. Therefore the judgment of the court below is

Affirmed.

HERM RAPER v. GEORGE S. COLEMAN AND LUTHER RICHARDSON.

(Filed 6 October, 1926.)

1. Mortgages—Notes in Sets—Acceleration of Payment.

A mortgage for the balance of the purchase money due by the mortgagor of lands, securing several notes maturing at different periods, may by its terms hasten the maturity of the sum total of the indebtedness by expressly providing that should one of the notes or interest thereon not be paid at its maturity, then all the indebtedness should become due and payable.

2. Same—Sales—Maturity.

Where by express provision in a mortgage the power of sale is given when one in a series of notes it secures and interest thereon should remain unpaid after maturity, the exercise of the power of sale need not await the maturity of all of the notes in the series, but may be exercised when a note of earlier maturity or interest thereon remains unpaid under its terms.

RAPER *v.* COLEMAN.

APPEAL by plaintiff from *Sinclair, J.*, who dissolved a temporary restraining order. From JOHNSTON. Affirmed.

On 28 November, 1923, the defendant Coleman sold and conveyed to the plaintiff sixty acres of land in Johnston County at the agreed price of $15,000. The plaintiff paid $6,000 in cash and executed and delivered to said Coleman a purchase money mortgage on the same land for the sum of $9,000, payable at the rate of $1,000 a year for nine years, the first payment to be made on 1 December, 1924, and the last on 1 December, 1932. The mortgage, which was duly registered, contained the following foreclosure provision: "But this deed is made on this special trust; that if said party of the first part shall well and truly pay to said party of the second part, or his legal representatives, the bonds hereinbefore described, at their maturity, then this deed to be null and void. But if default shall be made in the payment of said bonds, or the interest on the same, or any part of either, at maturity, then and in that event it shall be lawful for and the duty of said party of the second part to sell said land hereinbefore described to the highest bidder for cash, at the courthouse door in Johnston County, first advertising said sale, etc., . . . and out of the moneys arising from said sale to pay said bonds and interest on same, together with costs of sale."

The plaintiff made the first payment, but failed to meet the second installment of $1,000, which was due 1 December, 1925; and on 10 December, 1925, Coleman as mortgagee caused the land to be advertised for sale under the mortgage, and at the alleged sale made 11 January, 1926, the defendant Richardson bid off the land at the price of $8,500. On 19 January, 1926, the plaintiff instituted this action and obtained a temporary order restraining Coleman from executing and delivering any conveyance of the mortgaged premises, and thereafter the restraining order was dissolved by Judge Sinclair, whereupon the plaintiff excepted and appealed.

Charles U. Harris and Ed. F. Ward for plaintiff.
Paul D. Grady, Pou & Pou, and J. L. Emanuel for defendants.

ADAMS, J. The appeal raises the question whether under the clause of defeasance the mortgagee's right to foreclose accrued upon the mortgagor's failure to pay the bond of $1,000 maturing on 1 December, 1925. The plaintiff, admitting that this is the only question presented by his exception, stresses the point that the mortgagee cannot sell before the date at which the last bond is to become due, while the defendants say that a sale of the mortgaged property is authorized by the terms of the defeasance upon default in the payment of the bonds, or the interest thereon, or upon default in the payment of any part of either at maturity.

As a rule, a court of equity will not decree the foreclosure of a mortgage until the period limited for the payment of the secured debt is past and the estate is forfeited to the mortgagee, for it cannot shorten the time on which the parties have expressly agreed. *Harshaw v. McKesson,* 66 N. C., 266. Hence, if several bonds maturing at different periods are secured by a mortgage and there is nothing in the contract, pleadings, or evidence that matures or hastens the maturity of the deferred payments, or any other event which constitutes a default, there is no right of foreclosure either for the whole debt or for any part of it until the last bond becomes due—the mortgagee's remedy meantime being a suit to recover judgment for such part of the debt as may have matured, a similar action from time to time as the other installments become due, and, if reasonably required for his protection, a suit for the present possession of the mortgaged premises. *Walker v. Burrell,* 172 N. C., 386.

This Court has also held that if the parties to the contract stipulate that the estate shall be forfeited or that the right to sell may be exercised upon the debtor's failure to pay the specified installments of the debts as they mature, then upon the debtor's failure to pay any installment that is due the mortgagee may demand his money or proceed immediately to foreclose. *Harshaw v. McKesson, supra.*

The cases cited in the brief of the plaintiff fall within the first of these two classes and do not support the position taken in his argument. *Jones v. Boyd,* 80 N. C., 258, and *Brame v. Swain,* 111 N. C., 540, were suits for the specific performance of contracts to convey land, and while in such cases the relation of vendor and vendee is analogous to that of mortgagee and mortgagor, it was decided that neither action could be maintained until the last installment of the debt became due; but these cases did not disclose any provision for accelerating the maturity of the notes or any other event constituting a default by the terms of the contract. In *Hinton v. Jones,* 136 N. C., 53, the defendant's deed of trust secured a single note of $6,000 "with interest from date, to be paid semi-annually, the principal to be paid one-tenth annually until said note was paid in full," and contained the clause, "Should the said Jones well and truly pay said note as it falls due, then this deed shall be null and void; but should he fail to do so, then the said C. L. Hinton may sell." In accord with the authorities, it was held in reference to this provision that the trustee's sale must await the maturity of the entire debt, the Court emphasizing the absence of any provision that the entire note should become due and payable or that sale should be made upon default in any of its installments. Upon this theory the decision was referred to the principle stated in *Harshaw v. McKesson, supra. Martin v. Kirkpatrick,* 149 N. C., 400, simply adjudged that the provision of the Bankrupt Act maturing all debts owing by the bankrupt which were payable

at the date of the adjudication did not interfere with the terms of the bankrupt's mortgage designating the conditions on which the power of sale could be exercised. It is obvious, then, that the defeasance in the mortgage executed by the plaintiff may be distinguished from the clauses which were passed upon in these cases, in that a sale by Coleman, the mortgagee, is authorized upon default in the payment of either bond. The parties did not stipulate in express terms that the entire debt should fall due upon default in the payment of one bond, as was stipulated in the mortgage referred to in *Barbee v. Scoggins,* 121 N. C., 135, and similar cases; but they provided for the application of the proceeds of sale to all the unpaid bonds and the practical effect is the same as if such a stipulation had been set out in the mortgage. After naming the bonds "hereinbefore described"—those representing the deferred indebtedness of $9,000 at the rate of $1,000 a year for nine years—the mortgagor stipulated that if default should be made in the payment of *said bonds,* or the interest thereon, or any part of either at maturity, that is, any part of the bonds or any part of the interest at maturity, in that event it should be lawful for and the duty of the mortgagee to sell the mortgaged property and out of the proceeds to pay *said bonds* and the interest thereon. The language is plain. The mortgagee was empowered to make sale upon the mortgagor's default in the payment of either bond at maturity and to apply the proceeds in satisfaction of the unpaid notes. To say that the money derived from the sale should be applied in payment only of the bond then due upon its face and remaining unpaid would antagonize the express contract and would involve the retention by the mortgagee or some other disposition of the remaining proceeds not within the contemplation of the parties.

Our conclusion is in agreement with former decisions of this Court. In *Kitchin v. Grandy,* 101 N. C., 86, it is said that where several notes due at different dates are secured by a mortgage or deed in trust wherein it is provided that upon default in the payment of any one of them the mortgagee or trustee may sell, and he does sell after the first note is due and before the maturity of the others, the proceeds must be applied ratably to all the notes remaining unpaid. To the same effect is *Whitehead v. Morrill,* 108 N. C., 65. The mortgage foreclosed in *Gore v. Davis,* 124 N. C., 234, specified, "If default should be made in the payment of said bond or the interest on the same, or any part of either at maturity," the creditor could proceed to sell the land and out of the proceeds of sale should "pay said bond and interest." There was default in the payment of interest, and the Court said, "By the conditions of the mortgage the principal and interest became due." In *Eubanks v. Becton,* 158 N. C., 230, the sale made under the power conferred by the mortgagor was assailed on the ground that the mortgage, although containing

a provision that the land might be sold upon failure to pay either note, did not provide that upon such failure the whole indebtedness should become due, and therefore that no sale could be made until the maturity of the last note. In the opinion it is said: "The mortgage contains the express stipulation that the land may be sold upon failure to pay either note, and requires the proceeds of sale to be applied to 'the principal and interest which shall then be due on the said bonds.' The language is clear and the intention of the parties easily ascertained, and we must give effect to it. It is permissible to provide that the whole debt shall become due upon failure to pay any part, but not essential to the exercise of the power of sale. *Gore v. Davis,* 124 N. C., 234." The Court has maintained the doctrine in the later cases of *Miller v. Marriner,* 187 N. C., 449, and *Leak v. Armfield, ibid.,* 625. The judgment is

Affirmed.

ARTHUR HOLEMAN v. PENSACOLA SHIPBUILDING COMPANY.

(Filed 6 October, 1926.)

1. **Master and Servant—Employer and Employee—Negligence—Pleadings—Evidence—Nonsuit.**

Where contributory negligence and assumption of risk are pleaded by the defendant in an employee's action to recover damages for an injury alleged to have been negligently inflicted, and the plaintiff's evidence, without contradiction, tends alone to sustain the defense, a motion for a judgment as of nonsuit should be allowed, and not otherwise.

2. **Same—Contract—Tort.**

The application of the doctrine of assumption of risk arises by contract between the master and servant, and that of contributory negligence sounds in tort.

3. **Same—Proximate Cause.**

Where the application of principle of contributory negligence arises in the servant's action for damages against the master, direct and uncontradicted evidence of the plaintiff that he was driving defendant's truck loaded with lumber, and that some of the lumber fell upon the steering wheel after the accident occurred, will not avail the defendant on his motion to nonsuit, when there is evidence in plaintiff's behalf tending to show that the injury was proximately and previously caused by a defect in the steering machinery of the truck, which amounted to actionable negligence on the defendant's part.

4. **Master and Servant—Employer and Employee—Assumption of Risk—Defective Implements—Automobiles—Trucks.**

The driver of defendant's truck while hauling lumber in the course of his employment, does not assume the risk of a worn and defective

"radius rod," the condition of which proximately caused the injury for which damages in the action are sought.

5. Same—Duty of Master—Added Danger.

A servant does not assume the risks incident or usual to the employment engaged in that were not so observable or obvious that a prudent man, under the circumstances, would not have continued with their use, or where the injury complained of was proximately caused by an added danger arising from the defendant's omission of the duty owed to him.

APPEAL by defendant from *Cranmer, J.*, at April Term, 1926, of NORTHAMPTON. No error.

Civil action to recover damages for personal injuries. Plaintiff, an employee of defendant, was injured while driving a truck furnished him by defendant, to haul lumber as directed by his foreman. It is alleged that the truck was defective in that the radius rod was badly worn and bent, and that the road over which plaintiff was required to drive the truck was in bad condition; that while he was driving the truck, loaded with lumber, plaintiff lost control of it, because of the defective radius rod, and the bad condition of the road; that the truck ran off the road, turned over several times and threw plaintiff to the ground, thus causing serious personal injuries to plaintiff.

Defendant denied the allegations of the complaint, with respect to the defective truck, and the condition of the road. It alleged in defense of plaintiff's recovery, his contributory negligence and the assumption of risk by him. Plaintiff alleges that when he was directed by his foreman to use the truck for hauling lumber, he discovered that the radius rod was badly worn and bent, and that for this reason it was dangerous to use it; that he notified his foreman of the defect in the truck, and that the foreman promised to have the truck repaired; that in obedience to the foreman's direction, and relying upon his promise to have the truck repaired, he began work, with the truck, on the morning of the second Saturday in May, 1925, and continued to haul lumber with it until about 2 p.m. of the same day, when he was injured.

From the judgment upon the verdict, finding that plaintiff was injured by the negligence of defendant, as alleged in the complaint, and that he did not contribute to his injury by his negligence, or assume the risk of injury, as alleged in the answer, and assessing his damage at $2,000, defendant appealed to the Supreme Court.

Burgwyn & Norfleet and Travis & Travis for plaintiff.
George C. Green for defendant.

CONNOR, J. Defendant's assignment of error, for that its motion for judgment of nonsuit was not allowed by the court, cannot be sustained.

The testimony of all the witnesses, with respect to the condition of the truck, and the cause of plaintiff's injury, offered as evidence upon the first issue, if accepted by the jury, was sufficient to sustain the affirmative of the issue. The failure of defendant, by the exercise of due care, to supply plaintiff with a truck reasonably safe and suitable for the work which he was directed to do by his foreman, was negligence; there was evidence from which the jury could find that this negligence was the proximate cause of the injury sustained by plaintiff. No serious contention to the contrary is made by the defendant. An employer who furnishes his employee an implement, tool or appliance, with which to do the work for which he is employed, is not an insurer; it is the duty of the employer, however, to exercise due care to furnish to his employee a reasonably safe implement, tool or appliance. Breach of this duty is negligence; when it is the proximate cause of an injury to the employee, the employer is liable in damages, unless relieved of such liability by the contributory negligence of the employee, or by his assumption of the risk of injury, except where by statute these defenses are not available to the employer.

Defendant contends, however, that upon the testimony of plaintiff and of his witnesses, offered as evidence in his behalf, it should be held that plaintiff, by his own negligent conduct, contributed to his injury, and that because of his knowledge of the defect, which was so obvious that he fully understood and appreciated the danger of driving the truck, he assumed the risk of an injury such as he sustained. It has been held by this Court that when contributory negligence appears from plaintiff's evidence, a motion for nonsuit should be allowed. *Nowell v. Basnight,* 185 N. C., 142, and cases cited; this principle is applicable when defendant pleads assumption of risk by plaintiff as a defense. When from the facts established by plaintiff's evidence the defense of assumption of risk is sustained the motion for nonsuit should be allowed. The principle, however, does not apply in either case, unless all the evidence offered by plaintiff, with all permissible inferences therefrom, sustains only the affirmative of the issues involving these defenses.

The difference in principle between assumption of risk, which arises out of contract, and contributory negligence, which arises out of tort, as stated in *Horton v. R. R.,* 175 N. C., 472, was approved in the opinion of *Stacy, J.,* in *Cobia v. R. R.,* 188 N. C., 487.

Defendant alleges that plaintiff contributed to his own injury in that he had so loaded the truck with lumber, that a piece thereof slipped over on the steering wheel of the truck, thereby depriving plaintiff of the power to steer the truck. The only evidence as to the conduct of plaintiff in loading or driving the truck, immediately before he was injured, is his own testimony. He testified that the lumber on the truck was

loaded on both sides of the driver, and that it slipped after the truck went down into the gully, and fell on him after he was thrown from the truck to the ground. At the time he was driving very slowly, "just creeping along, for nobody could go fast on that road." The ditch or gully ran across the road; plaintiff lost control of the truck because the radius rod was bent.

Defendant cannot complain that this evidence was submitted to the jury upon the issue as to contributory negligence; clearly it cannot be held that all the evidence established the affirmative of the issue.

Defendant alleges "that if plaintiff was injured as alleged in the complaint, which is expressly denied, such injury was the result of one of the ordinary risks of his employment, which the plaintiff voluntarily assumed."

If defendant had exercised due care to furnish plaintiff a truck, which was reasonably safe, and plaintiff had been injured by an accident, such as the jury might have found sometimes occurs with trucks and automobiles, which have no apparent defect, this defense, if established by the evidence, might have availed defendant; but it cannot be held that the risk of injury, while driving a truck, with a radius rod which is badly worn and bent, is one of the ordinary risks voluntarily assumed by an employee who is directed by his employer to haul lumber with a truck.

Defendant further alleges "that if the plaintiff was injured as alleged in the complaint, which is expressly denied, the plaintiff knew and fully appreciated the risk incident to driving a truck with a bent radius rod over a rough road, and defendant pleads the plaintiff's voluntary assumption of risk in bar of his right to recover in this action."

Plaintiff testified that he discovered, when directed by his foreman to haul lumber with the truck, that the truck was in bad condition, due to the fact that the radius rod was badly worn and bent, and that he knew it was dangerous to drive the truck over the road loaded with lumber. He testified further, however, that before beginning work, he informed the foreman of the defect in the truck, and that the foreman directed him to use it, promising to have the truck repaired. Relying upon this promise of the foreman, and in obedience to his instructions, plaintiff began work, and within a few hours thereafter was injured.

The evidence was properly submitted to the jury. Conceding that the danger from the use of the defective truck was obvious, it was for the jury to determine whether it was so obvious that a prudent man, under the circumstances, would have declined to use the truck. Plaintiff assumed all the ordinary risks of his employment, as the driver of a truck, loaded with lumber; he did not, however, assume those risks which were caused, or added to by defendant's negligence in furnishing him a defective truck, unless these risks were so obvious and threatening that

a man of ordinary prudence would not have continued at work with the truck, because the chances of injury were greater than those of safety. *Deligny v. Furniture Co.,* 170 N. C., 189, and cases cited.

Notwithstanding the jury should find from the evidence that the danger from using the defective truck was obvious, and that plaintiff knew that the chances of injury were greater than of safety, if they should further find, as plaintiff testified, that the foreman promised to have the truck repaired, and instructed plaintiff to use it, in its then condition, and that plaintiff relied upon this promise, plaintiff's recovery for injuries caused by defendant's negligence would not be barred. *Horton v. R. R.,* 169 N. C., 108. The evidence was properly submitted to the jury, in accordance with the decisions of this Court.

A witness for plaintiff testified that the foreman of defendant told him after the accident that he had told the company before the accident that the truck was in bad condition, and that he had expected some one to get hurt. Defendant's motion that this statement should be stricken out was denied, and defendant excepted. This statement was incompetent, and the motion should have been allowed. *Younce v. Lumber Co.,* 155 N. C., 241. The error, however, was not prejudicial, in view of the testimony of plaintiff that before he began to work, he informed the foreman of the condition of the truck; the evidence was, at most, merely cumulative. If the testimony of plaintiff was believed by the jury, the defendant knew of the condition of the truck before the injury, for the knowledge of the foreman was imputed to it.

We have examined other assignments of error discussed in defendant's brief. They cannot be sustained as prejudicial to defendant. The judgment should be affirmed. There is

No error.

NATHAN A. MASSENGILL v. J. H. ABELL.

(Filed 6 October, 1926.)

1. Wills—Devises—Heirs— Issue — Estates — Remainders — Contingent Limitations.

Where a testator devises certain of his lands to his son "and his heirs," the devise will be construed to convey to the son the fee-simple title, but where immediately followed in the same item by the words "and if no heirs at his death to return to his nearest relations," a different intent is evidenced, and the words "heirs" in the latter clause will be interpreted as children, and upon the happening of the contingency his nearest relations will take under the application of the doctrine of springing or shifting uses.

2. Same—Statutes.

Where a devise of lands is limited over should the first taker die without heirs, evidencing that the intent of the testator made the contingency to depend upon his dying without issue, C. S., 1739, has no application.

3. Same—Deeds and Conveyances—Uses and Trusts.

A devise of land to the testator's son and his heirs, and if no heirs with limitation over: *Held*, the son takes a fee simple subject to be defeated should he die without leaving issue, in which event the limitation would take effect under the doctrine of springing or shifting uses, and he could not convey a fee-simple absolute title.

APPEAL by defendant from *Sinclair, J.* From JOHNSTON. Reversed.

Leon G. Stevens for plaintiff.
H. V. Rose for defendant.

ADAMS, J. This case was heard and determined upon an agreed statement of facts. Junius A. Massengill died in 1918 leaving a last will and testament, the fourth item of which is in these words: "I give and bequeath to my son, Nathan A. Massengill and his heirs, and if no heirs at his death to return to his nearest relations the following tract or parcel of land, lying south of the road, between the land given to my son, Robbie T. Massengill, and my daughter Lena Massengill." As to the location or identity of the land there is no controversy. Nathan A. Massengill was unmarried when the will was probated, but he has married since that time and now has a living child. In February, 1926, he contracted to sell and convey the devised land to the defendant at the agreed price of three thousand dollars and afterwards tendered a conveyance therefor duly executed by himself and his wife, with full covenants and warranties; but the defendant refused to accept the deed for the alleged reason that the plaintiff could not convey an indefeasible title in fee. Whether the plaintiff, with the joinder of his wife, can convey a title in fee simple is the question for decision.

It will be observed that in this item of the will the word "heirs" twice appears, and this fact proposes the initial inquiry whether in each instance the word is to be given the same meaning. It is an approved rule of construction that if a particular significance be attached by the testator to a word or phrase in one part of his will the same meaning will be presumed to be intended by him in the subsequent use of the same word or phrase; but the presumption does not obtain where a contrary intent appears. *Taylor v. Taylor,* 174 N. C., 537. Here such contrary intent does appear. That the devise to Nathan A. Massengill and his heirs conveys the fee is not open to debate; for obviously the word "heirs" is first used in its strict technical sense; but is this the sense in which it

is used in the phrase, "If no heirs at his death?" We think not. A limitation to the heirs of a living person, if no contrary intention appear in the deed or will, will be construed to be to the children of such person. C. S., 1739. But this is not a limitation to the heirs of a living person but a limitation over if there be no heirs at the death of the first taker, and the word "heirs" in this phrase, as we shall hereafter point out, means "issue"—the devise to be construed as if it read, "I give and bequeath to my son Nathan A. Massengill and his heirs and if no issue at his death"; that is, if he have no "issue" living at his death.

If the son acquired a fee, when is the ulterior limitation to become effective? Let it be noted that the testator did not annex to the devise a condition restraining alienation (*Latimer v. Waddell,* 119 N. C., 370), or limit a fee upon a fee with power of disposition in the first taker; but he limited a fee upon a fee by "cutting down the first in order to make room for the second." *Carroll v. Herring,* 180 N. C., 369. The principle is familiar. A devise to A. and his heirs, to be void if A. have no child living at his death, leaves in the devisor some interest which he may give to a third person, and in the disposition of such interest under the doctrine of springing and shifting uses a fee may be limited after a fee (*Willis v. Trust Co.,* 183 N. C., 267; *McDaniel v. McDaniel,* 58 N. C., 351), and the ulterior limitation will become effective upon the death of the first taker.

In *Patterson v. McCormick,* 177 N. C., 448, in reference to the common-law principle that a limitation contingent upon death was held to be void for remoteness, it is said that if the deed or will designated an intermediate period the courts held that "dying without issue was referable to this intermediate period"; also that the act of 1827 (C. S., 1737) changed the principle making the limitation void for remoteness, and abrogated the rule of construction which applied it to an intermediate period. In that case the decisions were reviewed and the effect of the statute was fully and clearly explained. In the section just cited it is provided that every contingent limitation in a deed or will made to depend upon the dying of any person without "heirs" . . . or "without issue" shall be held and interpreted a limitation to take effect when such person dies not having such "heir" . . . or "issue." The point, as we have intimated, was considered and decided in *Carroll v. Herring, supra.* There the testator devised two tracts of land to his son in these words: "To said James A. Carroll in fee, but if he die without heirs possessing these lands, or either tract, with remainder to the heirs of J. W. Carroll." In construing the devise the Court said: "The first and most simple way (of making unobscure English) is by the slightest punctuation, when it will read: 'I devise to my son James A. Carroll, the said tract of land in fee, but if he die, without heirs, possessing said land, or

either of the tracts, remainder to the heirs of J. W. Carroll.' Another way: 'I devise to my son James A. Carroll the said tract of land in fee, but if he die possessed of them, or either of them, and without heirs, then over to my son J. W. Carroll.' Or still another, which would express the limitation over in this way, after devising the tracts of land in fee to James A. Carroll: 'But if he die without heirs and possessed of (or, in other words, owner of) said tracts of land, then over to my son J. W. Carroll.' This clause was framed, as we find it in the will, for the evident purpose of relieving his son, James A. Carroll, from any restraint of alienation, and leaving him free to convey the land during his life, so as to render it of more value to him" . . . "This is perfectly clear upon the face of the will alone, but the very expression 'possessing these tracts of land, or either of them,' is plainly indicative of this purpose. It meant, if he sold and conveyed, not only both of them, but either of them, as to both, or as to the one sold, the title should be good in the purchaser, but as to the other, that is, the one not conveyed, it should go, at James' death without issue, to J. W. Carroll. Nothing, it seems to us, could be more fully and clearly indicated than this intention of the testator by the language of his will."

So it is in the present case; if Nathan A. Massengill should die leaving no issue at his death the limitation over would take effect. It necessarily follows that the taker of the first fee by the execution of a deed of bargain and sale with warranty cannot bar those who upon the happening of the contingency may acquire title under the ulterior devise. The plaintiff therefore cannot convey to the defendant an indefeasible title to the land. The judgment is

Reversed.

ORIE V. MOSELEY, MARIE MOSELEY GILLIAM AND HUSBAND, L. S. GILLIAM, J. WOOTEN MOSELEY, LAUNA MOSELEY FAULKNER AND HUSBAND, WILLIAM FAULKNER, HATTIE MOSELEY PERSON AND HUSBAND, DR. J. B. PERSON, AND L. O. MOSELEY AND WIFE, SALLIE P. MOSELEY, v. EUNICE LEE MOSELEY, ADMINISTRATRIX OF THE ESTATE OF DR. H. P. MOSELEY, DECEASED, AND EUNICE LEE MOSELEY, INDIVIDUALLY, AND FANNIE D. MOSELEY.

(Filed 6 October, 1926.)

Descent and Distribution — Mortgages — Purchase Price — Personalty — Statutes.

Where a person dies intestate leaving an estate of lands upon which there were mortgages to secure the purchase price, and also personal property, the personalty should first be sold to satisfy the debts of the decedent before encroaching upon the real property descendible to the heirs, under the provisions of our statute, C. S., 74.

APPEAL by defendants from *Devin, J.,* at May Term, 1926, of PITT. Affirmed.

Material facts will be stated in the opinion.

Dawson & Jones for plaintiffs.
J. H. Paylor, F. E. Wallace, J. O. Carr for defendants.

CLARKSON, J. On 20 August, 1925, Dr. H. P. Moseley died without leaving any last will or testament. He had no children, but left surviving him at the time of his death a widow and the above named plaintiffs and defendants heirs at law and next of kin.

Eunice Lee Moseley, widow, duly qualified and is acting as administratrix of the estate. At the time of his death, Dr. Moseley was seized in fee and was in possession of seven tracts of land. All of the lands owned by Dr. Moseley at the time of his death were purchased by him, with the exception of one tract which he inherited from his father, W. O. Moseley.

At the time of Dr. Moseley's death there were and are now outstanding notes, secured by mortgages and deeds in trust, on his real estate executed by him, aggregating $19,952.74, of which sum $9,962.74 is for purchase price of land.

In addition to these obligations, secured by real estate, the deceased owed various amounts approximating $24,000.00 unsecured. The personal assets of the estate, collected and uncollected are estimated to be of the value of $57,350.00. The heirs of the deceased, his brothers and sisters, contend that the personal property in the hands of the administratrix should go to the discharge of the indebtedness of the deceased including the indebtedness for purchase price of land, thereby relieving the land of these encumbrances so that the heirs will take it free and discharged of all encumbrances; and the widow contends that the heirs only inherited under the statute of descent, the interest which the deceased had in said property which was an equity of redemption only.

The court adjudged as follows: "It is now, therefore, ordered, adjudged and decreed that the personal estate of said deceased is liable for all his debts, whether such debts be secured in any manner, or whether they be unsecured, and that the administratrix of said estate shall so apply such personal estate before any realty owned by said deceased at the time of his death be sold under mortgage or otherwise."

The only assignment of error is directed against this adjudication.

Defendants contend; under the rule of descent, section 1654 Consolidated Statutes, the property described therein is that which passes to the heirs, as follows: "When any person dies seized of any inheritance, or of any right thereto, or entitled to any interest therein, not

having devised the same, it shall descend under the following rules." That is the following interest of the deceased passes: (a) Any inheritance; or (b) any right; or (c) any interest therein.

That in construing the statute with reference to the administration of estates, and the statute of descents, 1654 Consolidated Statutes, it is necessary to consider not only what the administrator is entitled to resort to for the payment of indebtedness, but also what actually passes to the heirs under the statute; and defendants insist that under section 1654 of the rules of descent, it is only the interest which the deceased may have had in real estate which passes to his heirs. Defendants in their contentions are not unmindful of the prior decisions of this Court.

C. S., 74, is as follows: "Sale of realty ordered, if personalty insufficient for debts. When the personal estate of a decedent is insufficient to pay all his debts, including the charges of administration, the executor, administrator or collector may, at any time after the grant of letters, apply to the Superior Court of the county where the land or some part thereof is situated, by petition, to sell the real property for the payment of the debts of such decedent."

The language of C. S., 74, *supra,* is clear and unmistakable—when the personalty is insufficient to pay the debts to sell the real property for the payment of the debts.

Pearson, J., in *Hinton v. Whitehurst,* 68 N. C., 318, said: "The personal estate is the *primary* fund for the payment of debts. . . . By the statutes of this State, the land of deceased debtors is made liable for all the debts as a *secondary* fund, in case the debt cannot be made out of the personal estate." *Graham v. Little,* 40 N. C., 407; *Shaw v. McBride,* 56 N. C., 173; *Knight v. Knight,* 59 N. C., 134; *Creecy v. Pearce,* 69 N. C., 68; *Murchison v. Williams,* 71 N. C., 135; *University v. Borden,* 132 N. C., 489; Mordecai's Law Lectures, Vol. 2, p. 1324-5.

In *Humphrey v. Stephens,* 191 N. C., 104, it is held: "When a debt is secured by a mortgage, the debt is the principal and the mortgage only the incident, security for the debt. An assignment of the debt passes all the rights of the creditor in the mortgage. *Hyman v. Devereux,* 63 N. C., 629; *Smith v. Godwin,* 145 N. C., 242; *Stevens v. Turlington,* 186 N. C., 194; *Trust Co. v. White,* 189 N. C., 283."

Dr. Moseley owed the debts, and we can see no distinction in the debts being for borrowed or purchase money. The principle herein reiterated has been long the settled law of this State.

The judgment below is

Affirmed.

STATE OF NORTH CAROLINA ON THE RELATIONSHIP OF NORTH CAROLINA CORPORATION COMMISSION v. HARNETT COUNTY TRUST COMPANY, A CORPORATION.

(Filed 6 October, 1926.)

1. Pleadings—Demurrer.

Under our Code system, a pleading will not be overthrown by demurrer if liberally construed in favor of the pleader a cause of action is therein stated, however inartificially it may have been drawn, or redundantly stated.

2. Same—Admissions.

By demurring to the sufficiency of a complaint to state a cause of action, the defendant admits every allegation of a material fact properly pleaded.

3. Same—Banks and Banking—Corporations—Officers—Mismanagement.

In an action by the receiver of a bank to enforce individual liability against the directors and officers thereof for its negligent mismanagement, allegations in effect that defendant and others were active in its control and operation as officers and directors in the invalid transactions constituting the mismanagement, etc., is a sufficient charge of having committed the unlawful act to overthrow his demurrer.

4. Banks and Banking—Corporations — Officers — Directors — Trusts—Negligence—Damages.

Directors and general managers of a bank are held to the responsibility of trustees in regard to their official duties, and are liable to its receiver for loss of the corporation assets caused and brought about by their neglect or failure to perform their duties in this respect.

CIVIL ACTION before *Sinclair, J.*, at February Term, 1926, of HARNETT.

The Harnett County Trust Company was a banking corporation and was closed by order of the Corporation Commission on 26 April, 1923. Marshall T. Spears and C. S. Hicks were appointed permanent receivers, and under and by virtue of an order made by Judge Daniels at the November Term, 1923, of the Harnett Superior Court, said receivers were directed to institute a civil action against the directors and officers of the bank to enforce an alleged liability of said officers and directors for negligent management of the bank. Thereafter, in pursuance of said order, the receivers and A. R. Suggs, a depositor and stockholder of the bank, brought a suit against the defendant, J. R. Baggett, and other officers and directors of the bank, and filed a complaint. The defendant, J. R. Baggett, demurred to the complaint for that "said complaint or pleading does not set forth facts sufficient to constitute a cause of action against said J. R. Baggett in that said pleading does not at any time allege that said J. R. Baggett was an officer of said Harnett County Trust Company with authority in any way to affect the action of said trust company in any way or to represent same in any of the transactions complained of."

The demurrer was sustained and from the judgment sustaining said demurrer there was an appeal.

Seawell & McPherson and Hoyle & Hoyle for appellant.

BROGDEN, J. Does the complaint state a cause of action against the defendant?

It is an accepted rule of law and one established by the overwhelming weight of authority that "it is the purpose of The Code system of pleading, which prevails with us, to have actions tried upon their merits, and to that end pleadings are construed liberally, every intendment is adopted in behalf of the pleader, and a complaint cannot be overthrown by a demurrer unless it be wholly insufficient. If in any portion of it, or to any extent, it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will stand, however inartificially it may have been drawn or however uncertain, defective, or redundant may be its statements, for, contrary to the common-law rule, every reasonable intendment and presumption must be made in favor of the pleader. It must be fatally defective before it will be rejected as insufficient." *Hoke v. Glenn,* 167 N. C., 594; *Brewer v. Wynne,* 154 N. C., 472.

It is also universally held in this jurisdiction that a defendant by demurring admits as true every material fact alleged in the complaint properly pleaded. *Trust Co. v. Wilson,* 182 N. C., 166.

It was alleged in the complaint that the defendant was the solicitor of the bank at the time it was closed by the Corporation Commission. There is no allegation as to what authority he had as solicitor or what duties were imposed by said relationship, but there is further allegation as follows: "That the said B. P. Gentry, O. L. Johnson, W. L. Sutton, R. L. Steele, J. M. Shaw, B. A. Parker, J. O. Sutton and J. R. Baggett, were at said date and at the times hereinafter set out the *active officers,* loan and finance committee of said trust company, *controlling and operating said bank and dominating the affairs thereof.*"

It was further alleged, among other things that "said officers having from time to time used the funds and property of the said Harnett County Trust Company in negligently and wrongfully making financial transactions with other banks and individuals under such circumstances as amounted to bad faith and misfeasance and malfeasance of their duty which they owed to the Harnett County Trust Company, its creditors, depositors and stockholders."

It is further alleged that "the aforesaid B. P. Gentry, W. L. Sutton, J. M. Shaw, O. L. Johnson, H. L. Steele, J. R. Baggett, J. O. Sutton and B. A. Parker, while acting as officers and directors, and the loan

and finance committee of the Harnett County Trust Company, participated in and had knowledge of the aforesaid wrongful, unlawful and negligent conduct of the business affairs of the aforesaid Harnett County Trust Co."

The demurrer therefore admits:

1. That the defendant was one of the active officers controlling and operating said bank and dominating the affairs thereof.

2. That said officers participated in making financial transactions with other banks and individuals under circumstances amounting to bad faith.

3. That the defendants were acting as officers and directors in the invalid transactions complained of.

Directors and managing officers of a corporation are deemed by the law to be trustees, or *quasi* trustees, in respect to the performance of their official duties incident to corporate management and are therefore liable for either wilful or negligent failure to perform their official duties. Therefore, if there is a loss of the corporation's assets, caused and brought about by the negligent failure of its officers to perform their duties, the corporation, or its receiver, in case of insolvency, can maintain an action therefor. *McIver v. Hardware Co.*, 144 N. C., 478; *Whitlock v. Alexander*, 160 N. C., 465; *Besseliew v. Brown*, 177 N. C., 65. However, the officers of a corporation are not, as a rule, responsible for mere errors of judgment, nor for slight omissions from which the loss complained of could not have reasonably resulted. *Fisher v. Fisher*, 170 N. C., 378; *Patton v. Farmer*, 87 N. C., 337.

Upon the whole record, we are of the opinion that the demurrer should have been overruled.

Reversed.

IN RE WILL OF THOMAS S. MANN.

(Filed 6 October, 1926.)

Wills—Evidence—Transactions and Communications—Deceased Persons—Statutes—Beneficiaries—Executors and Administrators.

The rule that one interested in a will as a beneficiary and executor may not testify to any transaction or communication with the deceased beneficial to his own interest, unless in rebuttal, under the inhibition of C. S., 1795, does not apply to his testifying to the identity of certain papers as being those which he had previously seen in the testator's presence; nor to the fact that it was the same "will," when only for the purpose and effect of the identification of the sheets in question.

APPEAL by caveators from *Dunn, J.*, at January Term, 1926, of CARTERET.

IN RE MANN.

Issue of *devisavit vel non,* raised by a caveat to the will of Thomas S. Mann. Alleged want of proper execution, mental incapacity and undue influence are the grounds upon which the caveat is based.

The verdict establishes: (1) That the paper-writing propounded was duly executed and published in manner and form as prescribed by statute for the execution and publication of wills; (2) that Thomas S. Mann had sufficient mental capacity to make and execute the same as his last will and testament; (3) that the devise made therein to W. H. Bell, and his appointment as executor, were not procured by undue influence; and (4) that the paper-writing propounded, and every part thereof, is the last will and testament of Thomas S. Mann, deceased.

From a judgment on the verdict sustaining the will and ordering it to probate, the caveators appeal, assigning errors.

E. H. Gorham, W. C. Gorham and Ward & Ward for caveators.
C. R. Wheatly and Luther Hamilton for propounders.

STACY, C. J. A careful perusal of the record leaves us with the impression that the matter has been heard and determined substantially in accord with the principles of law applicable, and that the validity of the trial should be upheld. All questions in dispute have been settled by the verdict, and no action or ruling on the part of the trial court has been discovered by us which we apprehend should be held for reversible error.

The only question presented by the appeal, not heretofore settled by a number of decisions, is the one raised by the following objections to the testimony of W. H. Bell, beneficiary and executor under the will, and one of the propounders:

"Q. Mr. Bell, examine that paper-writing, please, and state whether or not you have seen it before. (Objection; overruled; exception.)

"A. Yes, sir, I have seen it before. I am the Bell mentioned in that paper-writing as executor and I drew the paper-writing, (referring to the three sheets in controversy).

"Q. Mr. Bell, those three sheets you have there, were they the same sheets attached then as they are now, at the time of the execution? (Objection; overruled; exception.)

"A. Yes, sir.

"Q. Were they attached then? (Objection.)

"Q. By the court: Is the will now as when he wrote it? (Objection; overruled; exception.)

"A. Yes, sir."

It is urged that this testimony should have been excluded as violative of the rule against admitting evidence of personal transactions or com-

munications between the interested party and the deceased, but we do not think the evidence in question falls within the inhibition of the statute.

True, it has been held that, in a proceeding of this kind, both propounders and caveators are "parties" within the meaning and spirit of C. S., 1795, which disqualifies a party or person interested in the event from testifying as a witness in his own behalf against the executor, administrator or survivor of a deceased person, concerning a personal transaction or communication between the witness and the deceased, except where the executor, administrator or survivor, is examined in his own behalf, or the testimony of the deceased person is given in evidence concerning the same transaction or communication. *In re Chisman,* 175 N. C., 420; *In re Harrison,* 183 N. C., 457; *Pepper v. Broughton,* 80 N. C., 251. The exclusion of such testimony rests not merely upon the ground "that the dead man cannot have a fair showing, but upon the broader and more practical ground that the other party to the action has no chance by the oath of the relevant witness to reply to the oath of the party to the action." *McCanless v. Reynolds,* 74 N. C., 301. Men quite often understand and interpret personal transactions and communications differently, at best; hence, the Legislature, in its wisdom, has provided that an *ex parte* version of such matters may not be received in evidence except as above stated and as further provided by the statute. *White v. Evans,* 188 N. C., 212; *Sherrill v. Wilhelm,* 182 N. C., 673; *Ins. Co. v. Jones,* 191 N. C., 176. The reason for the provision was stated by *Rodman, J.,* in *Whitesides v. Green,* 64 N. C., 307, as follows: "No interested party shall swear to a transaction with the deceased, to charge his estate, because the deceased cannot swear in reply. If, however, the representative of the deceased will swear to such a transaction, to benefit the estate, fair play requires the rule to be altogether dispensed with."

Here, the testimony of W. H. Bell, though a party and interested in the event, is not incompetent, because it does not concern a personal transaction or communication between himself and the deceased. The evidence deals only with independent facts and matters of which the witness was able to speak of his own knowledge and observation, without regard to what was done or said by the deceased. *Johnson v. Cameron,* 136 N. C., 243.

In *Lane v. Rogers,* 113 N. C., 171, it was held that the interested witness might say she saw a memorandum book in the hands of the deceased, at the time and place in question, but not that the deceased handed her the book. And in *Peoples v. Maxwell,* 64 N. C., 313, it was held competent for an adverse party to the action to prove the handwriting of the deceased if he knew it, but not to testify that he saw

the deceased sign the paper-writing. In that case, the written receipt was executed to the witness, and hence the actual signing was a transaction between the witness and the deceased. To same effect is *Bright v. Marcom,* 121 N. C., 86. But here the witness only testified to what he saw; that the paper-writing was the same then as now, and that it consisted of three sheets of paper, attached together. He did not testify to any personal transaction between himself and the deceased. *Carroll v. Smith,* 163 N. C., 204; *McCall v. Wilson,* 101 N. C., 598; *Ballard v. Ballard,* 75 N. C., 191. The witness did not say the will was executed by the deceased. It is true, he was asked if the will is now "as when he wrote it," and if the three sheets were attached "at the time of the execution" as they are now? But these expressions were used to designate the time in question, and the witness so understood them. The answers relate only to what he saw and not what was done by the deceased. The objections to the evidence were properly overruled. *In re Harrison, supra.*

The validity of the trial must be upheld.

No error.

CHARLES F. DUNN v. VICTORIA JONES.

(Filed 6 October, 1926.)

Deeds and Conveyances—Tax Deeds—Mortgages—Statutes.

In order to the validity of a tax deed as against one who has since acquired title to the lands by foreclosure sale under the power in a mortgage, existing at the time, the notice required by C. S., 8028 must have been given the mortgagee, the land must be sufficiently described in the tax collector's certificate, and in the plaintiff's affidavit, and the statutory notice properly shown to have been given the defendant.

CIVIL ACTION before *Bond, J.,* at June Term, 1926, of LENOIR.

Plaintiff brought suit against the defendant for possession of a lot of land in the city of Kinston, claiming to be the owner of the land by virtue of a tax deed made by W. B. Coleman, city tax clerk and tax collector for the city of Kinston. The defendant resisted the claim of the plaintiff on the ground that the tax deed was not executed in compliance with the statute. On 16 June, 1914, F. I. Jones and wife executed a mortgage on the land in dispute to J. G. Banton, cashier, Holloway, Murphy & Co., bankers of the county of Lenoir. The land was sold for taxes by the city of Kinston on 6 June, 1922, and purchased by J. G. Banton, cashier of said bank. Thereafter, on 22 January, 1923, Banton

transferred the note and mortgage to the defendant, Victoria Jones. Thereafter, on 28 February, 1923, Banton sold the tax certificate to the plaintiff.

The affidavit of the plaintiff described the land as "land of Fred I. Jones, deceased." The certificate from Coleman, tax collector, described the land as follows: "One lot of land listed by F. I. Jones." The transfer of the mortgage from Banton, mortgagee, to the defendant was as follows: "For value received, this mortgage and note transferred to Victoria Jones. J. G. Banton, cashier, Peoples Bank, 1/22/23."

At the conclusion of all the evidence the trial judge dismissed the action and the plaintiff appealed.

Charles F. Dunn, in propria persona.
Shaw, Jones & Jones for defendant.

PER CURIAM. The plaintiff in his brief says: "When the rich young ruler went to Christ and asked what he should do to inherit eternal life, the Great Teacher told him how he could do so, and the young ruler told Christ that he had done all of the things enumerated, and asked the Master, 'What lacketh I now?' and the Great Teacher told him what he should do in addition to what he had done. I most respectfully contend that I have done what is laid down in the statutes in cases of this kind, and I most respectfully ask this Court, 'What lacketh I now?' "

In the first place, the plaintiff "lacks" an accurate reference to the rich young ruler as will appear from an examination of the record. Mark, 10:17-23; Luke, 18:18-23. The Biblical record discloses that the rich young ruler lacked only one thing; while, on the other hand, the title of plaintiff lacks several essentials to a valid tax title.

1st. There is no notice to the mortgagee Banton or Holloway, Murphy & Co. as required by statute. The assignment of the mortgage, not purporting to act upon the land, does not pass the estate of the mortgagee in the land. C. S., 8028; *Williams v. Teachey,* 85 N. C., 402; *Weil v. Davis,* 168 N. C., 298; *Banks v. Sauls,* 183 N. C., 165; *Trust Co. v. White,* 189 N. C., 281; *Collins v. Dunn,* 191 N. C., 429; *Price v. Slagle,* 189 N. C., 757.

2nd. The certificate of the city tax collector contained no sufficient description of the land as required by statute. *Collins v. Dunn,* 191 N. C., 429.

3rd. The affidavit of the plaintiff does not sufficiently describe the land as required by law, the only description of the land in the affidavit being "land of Fred I. Jones." *Collins v. Dunn,* 191 N. C., 429; *Price v. Slagle,* 189 N. C., 757.

4th. There is no evidence of proper statutory notice to the defendant, Victoria Jones. The receipt of a registered package alone, and without evidence that the package contained the alleged notice, is insufficient. *Collins v. Dunn,* 191 N. C., 429.

The Biblical record in Luke, 18:18-23, states that when the rich young ruler heard the words of the Master "he was very sorrowful; for he was very rich." In the case under consideration, if the plaintiff is sorrowful, by reason of this decision, it is because he has failed to observe and strictly comply with the statutes determining the validity of tax titles.

Affirmed.

STATE v. R. A. STRICKLAND.

(Filed 6 October, 1926.)

1. Instructions—Criminal Law—Evidence—Directing Verdict.

Where from all the evidence both for the State and the defendant on a trial for a criminal offense, only the inference of guilt can be legally inferred, an instruction to the jury is proper to find the defendant guilty should they so find the facts to be beyond a reasonable doubt.

2. Same—Assault—Statutes—Intent to Kill.

Where the indictment charges an assault with a deadly weapon with intent to kill, etc. (C. S., 4213, 4214, 4215), and all the evidence both for the State and for the defendant tends to show that the defendant himself brought on the fight by aggression, and that the prosecuting witness had been injured by being struck by some hard metallic substance in the defendant's hand, which he did not see, causing his nose to be broken and other serious injuries: *Held,* an instruction directing a verdict of guilty of at least simple assault is not erroneous.

3. Instructions—Appeal and Error—Criminal Action—Assault—"Serious Injury"—Prejudice.

Where the defendant has been convicted of an assault inflicting serious injury, an instruction defining "serious injury" if prejudicial, will not be held as reversible error if from all the evidence it unmistakably appears that a serious injury had been inflicted on the prosecuting witness by the defendant.

APPEAL from *Cranmer, J.,* and a jury, at June Term, 1926, of HALIFAX. No error.

Material facts stated in the opinion.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

George C. Green and Travis & Travis for defendant.

CLARKSON, J. The bill of indictment contains two counts: (1) "Did unlawfully, wilfully, feloniously and maliciously assault, beat and wound one H. M. Rowland with a deadly weapon, to wit, metallic knucks, by waylaying, and otherwise in a secret manner with intent, him the said H. M. Rowland, then and there feloniously, wilfully and of his malice aforethought to kill and murder to the great damage of the said H. M. Rowland." C. S., 4213.

(2) "Unlawfully, wilfully and feloniously with a certain deadly weapon, to wit, metallic knucks, in and upon one H. M. Rowland did make an assault, with an intent him, the said H. M. Rowland, then and there feloniously, wilfully and of his malice aforethought to kill and murder and upon him the said H. M. Rowland, did inflict serious injury not resulting in death, to wit, breaking his nose, wounding his temple," etc. C. S., 4214.

C. S., 4215, is as follows: "In all cases of an assault, with or without intent to kill or injure, the person convicted shall be punished by fine or imprisonment, or both, at the discretion of the court: *Provided,* that where no deadly weapon has been used and no serious damage done, the punishment in assaults, assaults and batteries, and affrays shall not exceed a fine of fifty dollars or imprisonment for thirty days; but this proviso shall not apply to cases of assault with intent to kill or with intent to commit rape, or to cases of assault or assault and battery by any man or boy over eighteen years old on any female person."

The verdict of the jury "who say for their verdict, that the defendant is guilty of an assault without a deadly weapon, inflicting serious injury."

The court below charged the jury as follows: "Now, under the bill as drawn, gentlemen of the jury, I instruct you that you may render one of five verdicts. You may convict him on the first count which I have read to you, or you may convict him on the second count, which I have read to you. You may convict him of assault with a deadly weapon, or you may convict him of assault with serious damage, or you may convict him of simple assault. *And I instruct you that, in no event, can you acquit the defendant for the reason that, if you believe the testimony heard by you in the case, including the testimony of the defendant himself, it is your duty to convict him at least of simple assault.*"

To the latter part of the charge the defendant excepted and assigned error.

In that immediate connection, the court below instructed the jury that the burden was upon the State to satisfy them beyond a reasonable doubt as to the four charges in the bill. As to the fifth the instruction

amounts in practical effect to telling the jury that if they believed the testimony of the defendant himself he was at least guilty of simple assault.

C. S., 4640, is as follows: "Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime."

In *S. v. Murphrey,* 186 N. C., at p. 115, it is said: "In *S. v. Riley,* 113 N. C., 648, *Clark, J.,* observed: 'The evidence for the State being uncontradicted, the court told the jury, if they believed the evidence, to return a verdict of guilty. This was correct, upon the evidence set out, and if the jury had returned a verdict, there would be no ground for exception'; and in *S. v. Hill,* 141 N. C., 769, *Hoke, J.,* concluded that where, in any aspect of the testimony, the defendant's guilt is manifest, the judge may tell the jury, 'if they believe the evidence,' or 'if they find the facts to be as testified,' 'they will return a verdict,' etc. *S. v. Woolard,* 119 N. C., 779; *S. v. Winchester,* 113 N. C., 641. Our conclusion is not at variance with the decision in *S. v. Singleton,* 183 N. C., 738, or *S. v. Estes,* 185 N. C., 752, for in each of these cases it was held that the evidence, if true, did not necessarily establish the guilt of the defendant, and that under a proper charge the matters in controversy should have been submitted to the jury. We have directed attention to the fact that the testimony in the case at bar is uncontradicted; but even in instances of this character it would be more satisfactory if the court's instruction to the jury followed the usual formula on the question of 'reasonable doubt.'" *S. v. Moore, ante,* 209.

"The principle does not apply where the evidence, if true, is susceptible of more than one deduction." *S. v. Moore, supra; S. v. Horner,* 188 N. C., 472; *S. v. Hardy,* 189 N. C., 799.

Is the evidence, if true, susceptible of more than one deduction? We think not. The testimony of the defendant on this aspect, is as follows: "I told Rowland this and he said, 'That's a damn lie.' And I said, 'Mr. Rowland, if that's the way you feel about it I think you ought to be whipped.' And he said he was a professional boxer, and if I wanted to fight, 'Here's at it.' And he put himself in a boxing attitude, and the fight began. He struck at me first, and I warded the blow off. I can't say who stopped fighting first. We both stopped, and I walked back and got in the car and Mr. Rowland walked behind me up to the car, and I drove off and left him standing there. . . . I told him if he felt that way about it he ought to be whipped, and he said, 'If you want to fight, here's at you.' I hit Mr. Rowland *because he called me a damn lie:* he hit me first, or struck at me first, and I knocked his lick off. . . .

No, my wife did not call to me and say, 'Come on back to this car and stop beating up this man,' *when Rowland and myself were fighting.*"

In *S. v. Williams,* 186 N. C., 631, it is said: "In *Humphries v. Edwards,* 164 N. C., 158, *Walker, J.,* says: 'We extract the following principle from *S. v. Daniel,* 136 N. C., 571: "The principle is well established that not only is a person who offers or attempts by violence to injure the person of another guilty of an assault, but no one, by the show of violence, has the right to put another in fear and thereby force him to leave a place where he has the right to be. *S. v. Hampton,* 63 N. C., 13; *S. v. Church,* 63 N. C., 15; *S. v. Rawles,* 65 N. C., 334; *S. v. Shipman,* 81 N. C., 513; *S. v. Martin,* 85 N. C., 508; 39 Am. Rep., 711; *S. v. Jeffreys,* 117 N. C., 743."' "

The defendant hunted Rowland and when he found him approached him in a threatening way—when what is quoted above occurred. Certainly this was an entire willingness to fight on the part of the defendant and the fight ensued, there being no element of self-defense in this testimony. Under the evidence here, the right of self-defense did not exist, if the defendant did not start the fight, he willingly and wrongfully entered into it and so testified. *S. v. Perry,* 50 N. C., 9; *S. v. Lancaster,* 169 N. C., 284; *S. v. Crisp,* 170 N. C., 785; *S. v. Baldwin,* 184 N. C., 789. This assignment of error cannot be sustained.

The next assignment of error is to the following part of the charge of the court below: "Now, as to the question of serious damage, gentlemen of the jury, must be such physical injury as gives rise to great bodily pain, and also damage to the peace, good order, decency and propriety of society. I further instruct you, gentlemen, that if an assault is of such nature as to damage greatly the person of the party assaulted, or if it is calculated to outrage, stir up and disturb the quiet and good order of a community, or shock the moral sense of good citizens, it is serious damage." To sustain the latter part of the charge, Mr. Nash refers to *S. v. Huntley,* 91 N. C., at p. 621; *S. v. Shelly,* 98 N. C., 673, which seem to bear out the State's contention.

The prosecuting witness, H. M. Rowland, testified in part, in substance: That he had been for two years superintendent of the Scotland Neck Graded Schools; that about a quarter to nine, on the night of 30 April, he was about the middle of the block on the north side of the street in the business section of Scotland Neck. The defendant came up in his car and stopped and asked if he could speak to him, and he answered that he certainly could. Defendant got out of his car and came to him on the sidewalk and started talking about an incident that happened in the school in regard to his child having been whipped. The witness told defendant that he had not whipped his child; that while he was talking about the whipping of the child, totally off his guard, a

heavy, solid object struck him across the temple; that he was hit four or five licks in several places about the head; that it *broke his nose* and injured his eye, so he was unable to do any reading since, and the place on his head had been painful from that day until this. The object defendant had on his hand struck through three thicknesses of clothing—heavy winter underwear, shirt and coat, and cut and left his arm bruised, a mass of welts and in several places the blood had been cut out. Defendant continued until he winded himself. Witness had blood in his eyes until he could not see. Blood from his head and face had gotten into his eyes and blinded him. He could hear defendant breathing heavily as he got into his car. His physical condition has been highly nervous, extremely weak and pains in his head ever since. There is a stoppage in the nose which interferes with respiration and his sleep is irregular—unable to sleep and has headaches, nervous and eyes give trouble. The wound on his head bled very freely. He was hit with something heavy and metallic which defendant had on his hand. The witness did not see the child whipped, but understood that he was the one that was whipped. "Defendant told me that he understood that I had treated the child very unkindly and had handled him roughly, and I said, 'Some one has been lying to you.' I did not see the deadly weapon, but felt it very deadly."

Dr. Smith testified: "I made an examination of the injuries of Mr. Rowland on 30 April, around 9:00 or 9:30 o'clock p. m., at his home. He had a number of bruises and cut places on his head and face. He had cut place on top of his head, also on his forehead and his left cheek, and a gash on his temple. His arm was bruised in several places. His eye was swollen and bloodshot, *his nose was broken.* In my opinion the injuries upon the face and head and arm of Mr. Rowland could not have been inflicted by fist alone, nor with a ring with setting like that, but were made with some hard metal object."

There is no dispute on the record that the prosecuting witness' nose was broken—this was serious damage or injury.

The fight was admittedly willing by defendant on his part—the prosecutor's nose was broken by him. On the entire undisputed evidence, if believed by the jury, they were clearly correct in the verdict rendered: "Defendant is guilty of an assault without a deadly weapon inflicting serious injury." The jury, from the evidence, could have found defendant guilty of a higher crime, but on the undisputed evidence, surely not of a less crime. The charge of the court, if error, cannot, on the record, be held harmful or prejudicial.

For the reasons given, there is

No error.

ATLANTIC COAST LINE RAILROAD COMPANY v. TOWN OF AHOSKIE.

(Filed 6 October, 1926.)

1. Municipal Corporations — Street Improvements — Assessments —Taxation.

An assessment by a city upon owners of property along and adjoining a street to be improved, is laid with reference to the benefits the owners will receive from the improvement to be made, and differs therein from the levy of a municipal tax for general purposes.

2. Same—Statutes.

The power of a city to lay an assessment upon the lands of owners along or adjoining a street to be improved, is derived from the statutes applicable.

3. Municipal Corporations—Assessments—Street Improvements—Statutes.

Under our statute the improvement of a street by a city for which an assessment may be made upon adjoining owners of land, includes the grading, paving, repaving, macadamizing and remacadamizing thereof. C. S., 2703.

4. Municipal Corporations—Cities and Towns—Street Improvements—Assessments—Statutes—Actions—Evidence—Issues.

Under the provisions of our statute, it is necessary that there be an existing street in order for a valid assessment for improvements to be laid on the property of abutting owners, and this may be made an issue in the proceedings of the city commissioners to levy an assessment under our statute for improvements thereon, and the adjoining owner may introduce his evidence to show to the contrary. C. S., 2714.

CIVIL ACTION before *Cranmer, J.*, at April Term, 1926, of HERTFORD.

The plaintiff, railroad company, owned a parcel of land in the town of Ahoskie, containing about one and one-half acres, and lying between Main Street and First Street in said town, which was used by it as a freight and passenger depot. The town of Ahoskie paved a street from Main Street to First Street across the property claimed by the railroad. The railroad property did not extend the whole distance between Main and First streets, but was a block of land between these two streets. The town claimed a public street running from Main Street to First Street across the property of the railroad. After paving the property the town levied an assessment against the railroad as an abutting owner. The railroad resisted the confirmation of the assessment on the ground that it was not an abutting owner for the reason that a large portion of the paving was entirely upon its own property. However, the town proceeded to confirm the assessment. It is conceded that the amount of the assessment is correct and that the assessment was properly computed.

Acting under C. S., 2714, the railroad appealed from the confirmation of the assessment and duly filed a statement of facts upon which is based its appeal. Among other things, it is alleged in the statement of facts that "the said Railroad Street, so-called, for the paving of which said Atlantic Coast Line Railroad Company is assessed, as above specified, does not at any point abut the property of the said railroad company, but is for a considerable distance, to wit, 480 feet on the southerly side of said alleged street and 430 feet on the northerly side thereof, entirely on the land and property of Atlantic Coast Line Railroad Company, which said company owns in fee simple. . . . That the town has never acquired the right to use said strip of land it calls Railroad Street as a street or public highway, either by condemnation, prescription or other lawful manner, etc. . . . That the said town did not have any lawful right to use appellant's land as a street or public highway."

There was another allegation that the railroad had protested before the work was done.

Upon appeal to the Superior Court at the conclusion of evidence, the trial judge, "being of the opinion that the title to the property paved cannot be litigated in this proceeding, and that respondent railroad company is therefore liable for assessment made by the town owners, allows motion of the town to dismiss the exceptions and appeal."

From this judgment plaintiff railroad appealed to the Supreme Court.

F. S. Spruill and V. E. Phelps for plaintiff.
Thomas W. Davis, general solicitor of counsel.
Ehringhaus & Hall, W. W. Rogers and L. C. Williams, for defendant.

BROGDEN, J. This appeal involves the validity of an assessment against the property of the plaintiff railroad by the defendant town. The plaintiff asserts that the assessment is illegal because it is the owner of the larger portion of the property between Main and First streets, and the town has not acquired title thereto. The town contends that the question of ownership cannot be determined in an appeal from the confirmation of the assessment under C. S., 2714, but that the plaintiff must resort to an independent action for the value of the property so taken.

Two propositions of law are involved in this case:

1. Is the assessment valid?

2. Can the validity of the assessment be challenged in an appeal from the confirmation thereof, as provided by C. S., 2714?

An assessment "as distinguished from other kinds of taxation, are those special and local impositions upon the property in the immediate vicinity of municipal improvements which are necessary to pay for the

improvement, and are laid with reference to the special benefit which the property is supposed to have derived therefrom." (Black's Law Dictionary); *Raleigh v. Peace,* 110 N. C., 32.

It is a creature of the statute and its validity must flow from the statute which authorizes it. *Raleigh v. Peace,* 110 N. C., 32; *Greensboro v. McAdoo,* 112 N. C., 361; *Morganton v. Avery,* 179 N. C., 551.

So that, in order to determine the validity of an assessment, it is necessary to examine the statute under which it is laid. The underlying theory upon which a valid assessment is based is that a local improvement has been made by a municipality, and that the property of all abutting owners derives a benefit therefrom, for which they should be compelled to pay. The assessment in this case is laid for the improvement of an alleged street called Railroad Street. Our statute, C. S., 2703, defines a street improvement as follows: "Street improvement includes the grading, regrading, paving, repaving, macadamizing and re-macadamizing of public streets and alleys, etc."

The petition, which is the jurisdictional foundation of the improvement, under the statute, must be signed "by a majority in number of the owners who must represent at least a majority of all the lineal feet or frontage of the lands . . . abutting upon the street or streets, or part of a street or streets proposed to be improved." The next stage of the proceeding is the resolution by the governing authority of a municipality "which shall designate by general description the report to be made and the street or streets or part or parts thereof where the work is to be effected, etc."

Therefore, under our statute, one of the essential requisites of a valid assessment is the existence of a public street or alley.

It is admitted that all of the requisites of a valid assessment appear except the one requiring the existence or establishment of a public street. The defendant contends that the property improved was a public street, and the plaintiff contends to the contrary. This was a fact to be established by evidence. An assessment, under the express language of our statute, implies the existence of a public street. If no public street existed, then no assessment can be legally laid upon abutting owners.

The second question involves the consideration of whether or not the disputed fact as to the existence of a public street can be tried on appeal from the confirmation of the assessment in accordance with C. S., 2714.

In determining this question the defendant town relies upon the cases of *Hunerberg v. Village of Hyde Park,* 22 N. E., p. 486; *Holmes v. Village of Hyde Park,* 13 N. E., 540; and *Village of Hyde Park v. Borden,* 94 Ill., 26. The principle of law involved in these cases is thus stated in the *Hunerberg case:* "That which we have already said is a sufficient justification of the ruling of the county court in excluding the

evidence offered for the purpose of showing that appellant was the owner of the legal title to the east 33 feet of the lot covered by the street to be improved. But, besides this, there is no provision made in the statute to try titles to land in these proceedings to assess benefits upon property to pay for public improvements, nor is the county court vested with jurisdiction to try and determine the question of title to real estate. If, as is claimed by appellant, he is the owner in fee of the 33 feet of land, and is in the possession of the same, then such private property of his cannot be taken for public use without he first receives just compensation therefor, etc."

The reasoning in these cases does not apply to the case now under consideration for the following reasons:

1. In the *Hunerberg case* there was no contention that a street did not exist, but that plaintiff was the owner of a strip of land on the western boundary of the street of 33 feet; or, in other words, the plaintiff owned an encroachment upon the street sought to be improved.

2. An assessment is a creature of statute, and the Illinois statute is fundamentally different from the North Carolina statute.

It appears from the case of *Leman v. City of Lake View,* 23 N. E., p. 346, relied upon by the defendant, that the Illinois statute provided that when an ordinance was passed for making any local improvement and it appeared that private property was necessary for making the improvement, that a petition should be filed in some court of record of the county in which the property was situated, praying that steps be taken to ascertain the just compensation to be made for the private property so taken or damaged in making the improvement. Revised Statutes, Ill., Hurd., ch. 24, sec. 13.

The case of *Davis v. City of Silverton,* 82 Pac., 16, and *Hockfield v. Portland,* 142 Pac., 824, are both relied upon by the defendant. In the *Davis case* it was admitted that the plaintiff's land abutted on First Street; and also in the *Hockfield case* it was alleged and seems to have been admitted that East Oak Street, which was the street in controversy, was a public street of the city.

Under our statutes upon the subject an aggrieved party is given the right of appeal to the Superior Court, and the case is to be tried upon the statement of facts provided for in the statute.

In the case of *Brown v. Hillsboro,* 185 N. C., 376, it was held: "If the plaintiff desires to attack an assessment when levied against his property, the statute gives him remedy. C. S., 2714." And to the same effect is *Leak v. Wadesboro,* 186 N. C., 689, holding that "other sections provide for ascertaining the amount of and levying assessments, with the right of appeal to the Superior Court in case of dissatisfaction by any person against whom an assessment is made under section 2714."

In *Gunter v. Sanford,* 186 N. C., 452, it is held that "the statutes afford plaintiffs adequate means for litigating matters in controversy before the board of aldermen, and, if desired, by appeal from their decision to the Superior Court." *Anderson v. Albemarle,* 182 N. C., 434; *Tarboro v. Forbes,* 185 N. C., 59; *Long v. Rockingham,* 187 N. C., 199; *Holton v. Mocksville,* 189 N. C., 144.

In the *Anderson case, supra,* it was held that "in the absence of any showing to the contrary, assessments are presumed valid, and he who attacks their validity has the burden of establishing by competent evidence the contrary."

The conclusion of the whole matter, therefore, is whether or not this assessment was valid. If Railroad Street is a public street of the town of Ahoskie, then the town had the right to make a valid assessment against abutting owners. If it is not a public street, then no assessment under our statute could be properly made. This is a question of fact to be determined and established by competent evidence, and, certainly, the validity of the assessment under our statutes can be challenged in the assessment proceedings. Hence, the judgment dismissing the appeal and exceptions of the plaintiff was erroneous.

Reversed.

BRANCH BANKING AND TRUST COMPANY, RECEIVER OF BAILEY BANKING COMPANY, v. THOMAS H. BOYKIN, A. H. BOYKIN ET AL.

(Filed 6 October, 1926.)

1. Bills and Notes—Principal and Surety—Parol Evidence—Equities—Innocent Purchaser for Value.

As between the original payee and those whose names appear to have been signed as makers of a negotiable instrument, it may be shown by parol evidence that one or more of those who signed as makers signed in fact as surety for the other or others, but not as against an endorser, who acquired the instrument for value and holds innocently without notice of such relationship.

2. Same—Mortgages—Liens—Equity—Subrogation—Parol Evidence.

One whose name appears as one of the makers upon a negotiable note secured by a first mortgage lien, may show by parol evidence as against a subsequently registered mortgage, that he had signed as surety, and was entitled to subrogation to the rights of the mortgagee holding the first lien on the land subject to the two encumbrances.

3. Same—Payment—Assignment to the Use of Surety—Cancellation.

In order for one signing a negotiable instrument secured by a first lien or mortgage to pay off the indebtedness and retain his lien as against

those holding a lien under a subsequent mortgage, he must have the instrument endorsed to another for his use, and by canceling the mortgage security of record he loses his right, and only the relationship of an unsecured creditor exists.

4. Same—Judgments.

Where the payee of a note secured by a first mortgage note on the maker's land has reduced it to judgment in his suit to foreclose, and there appears thereon apparently as a comaker one who claims to have signed only as surety and who has paid off the mortgage indebtedness, the mortgage indebtedness merges into the judgment, and for the alleged surety who has discharged the indebtedness to be entitled to the equity of subrogation to the mortgagee's right, he must further show that the judgment had been transferred to another to his own use, and a payment thereof by him destroys this right.

CIVIL ACTION before *Calvert, J.*, at April Term, 1926, of NASH.

On 24 October, 1919, I. F. Finch conveyed to A. H. Boykin lots 2 and 3 of the Finch land. A. H. Boykin paid for this land $1,396.00 in cash and executed and delivered to Finch notes for the balance of the purchase money in the sum of $5,584.00, which said notes were secured by a first mortgage upon said lots. On 19 December, 1919, A. H. Boykin and Thomas H. Boykin, his brother, executed to the Bailey Banking Company their promissory note for $14,090.00, and in order to secure same executed and delivered a mortgage upon said lots 2 and 3, together with other property.

Thereafter, on 2 January, 1920, A. H. Boykin sold to H. G. Sanders lot No. 3 of said Finch land, Sanders paying $686.00 cash and executing and delivering to A. H. Boykin notes for the balance of the purchase price in the sum of $2,328.00, said notes being payable to I. F. Finch. Thereafter, I. F. Finch canceled his mortgage on lots 2 and 3, which was a first lien thereon, and accepted in satisfaction thereof the said notes of Sanders for $2,328.00 and a second mortgage or deed of trust on said lot No. 2 of the Finch land. This deed of trust from A. H. Boykin to C. H. Glover, trustee, secured notes aggregating $3,260.40, being the balance due Finch on the purchase price of lot No. 2. It appears from the record that neither H. G. Sanders nor I. F. Finch was aware of the existence and registration of the mortgage to Bailey Banking Co., securing the said note for $14,090.00. Thereafter the Bailey Banking Co. became insolvent and the plaintiffs, Branch Banking & Trust Co., was appointed receiver thereof. The receiver instituted an action to recover judgment against A. H. Boykin and Thomas H. Boykin on the $14,090.00 note and to foreclose all mortgages and collaterals securing this note. S. G. Mewborn was appointed commissioner to make the sale and advertised all the property, including lots 2 and 3 of the Finch land. Thereupon Sanders and Finch instituted an action

against A. H. Boykin and the receiver of the Bailey Banking Co., restraining the sale of lots 2 and 3 of the Finch land. At this stage of the proceeding a consent order was entered, consolidating both actions, and a consent judgment entered in accordance with which Mewborn, the commissioner, was authorized to sell lots 2 and 3 of the Finch land and hold the proceeds pending the determination of the rights of the parties to the proceeds. There was an unpaid balance due upon the judgment against A. H. Boykin and Thomas H. Boykin on the $14,090.00 note in excess of the amount received from the sale of lots 2 and 3 of the Finch land. Thomas H. Boykin paid the receiver, Branch Banking & Trust Co., the total amount due on the note of $14,090.00, and the receiver thereupon delivered to Thomas H. Boykin the note and mortgage securing the same, and Thomas H. Boykin had this mortgage securing said note for $14,090.00 canceled on the record. This cancellation of said mortgage was subsequent to the rendition of the foreclosure judgment before mentioned against A. H. Boykin and Thomas H. Boykin for $14,090.00.

So that, the relationship of the parties to this transaction at the time the said mortgage was canceled, is substantially as follows: 1. The said mortgage securing note for $14,090.00 executed to Bailey Banking Co. by A. H. Boykin and Thomas H. Boykin constituted a first lien upon lots 2 and 3 of the Finch land together with other property. 2. At the time of the cancellation of said deed of trust and the payment of said note, this mortgage indebtedness had been reduced to judgment. 3. H. G. Sanders had a deed for lot No. 3 of the Finch land subject to said deed of trust. 4. I. F. Finch held a second mortgage on lot No. 2 to secure an indebtedness of $3,260.00.

Lot No. 3, at the commissioner's sale, sold for $670.00, and lot No. 2 sold for $2,000.00. Thomas H. Boykin claims that he was surety for A. H. Boykin, his brother, and that, by the application of the equitable principle of subrogation, he is entitled to said $2,670.00, proceeds of the sale of said lots 2 and 3. Sanders claims $670.00, proceeds of the sale of lot No. 3, by virtue of the fact that A. H. Boykin gave him a warranty deed for said land. Finch claims the $2,000.00, proceeds of sale of lot No. 2 by reason of the fact that he had a deed of trust upon said lot. Sanders and Finch deny that Thomas H. Boykin was surety on the $14,090.00 note and contend that, even though he was surety, the cancellation of the mortgage securing same by Thomas H. Boykin destroyed the security and left him in a position of general creditor only. The mortgage, executed 1 December, 1919, by A. H. Boykin and Thomas H. Boykin to the Bailey Banking Co. to secure the note of $14,090.00 was in the usual form and contained this recital: "That whereas, said parties of the first part are justly indebted to the parties of the second part in the sum of $14,090.00, etc." At the trial Thomas H. Boykin offered

evidence tending to show that he was surety on said note for $14,090.00. This evidence was excluded by the court and judgment rendered that the commissioner, after paying certain costs, should disburse the proceeds of the sale of lots 2 and 3 of the Finch land as follows: "The proceeds of lot No. 3, he will pay to H. G. Sanders or H. D. Cooley, his attorney of record, and the proceeds of lot No. 2 he will pay to I. F. Finch, or to I. T. Valentine, his attorney of record." The judgment further states that "the court being of the opinion that the defendant, Thomas Boykin, cannot show by parol evidence as against H. G. Sanders and I. F. Finch that he was surety for A. H. Boykin upon the note to the Bailey Banking Co. as set out in the pleadings; there were no issues to be submitted to the jury arising from the pleadings, etc."

From the foregoing judgment defendant, Thomas H. Boykin, appealed.

Cooley & Bone, I. T. Valentine for plaintiff.
Connor & Hill for defendant.

BROGDEN, J. Two propositions of law are presented by the record, as follows:

1. Can Thomas H. Boykin show by parol evidence that he signed the $14,090.00 note to Bailey Banking Co. as surety for his brother, A. H. Boykin?

2. Does Thomas H. Boykin lose his right of subrogation by reason of cancellation of the mortgage securing the $14,090.00 note?

In determining the merits of the first proposition the general rule is that in the hands of an original payee an endorsement may be shown to be upon certain conditions; but a *bona fide* holder for value before maturity and without notice is not affected by any equities existing between the original parties. *Sykes v. Everett,* 167 N. C., 600.

"It is well settled that the agreement upon which the endorser of another's obligation signed, and the liability which he intended to assume, may (at least between the original parties, or those parties and holders with notice) be shown by parol evidence, and he will be held only according to such agreement and intention." *Southerland v. Fremont,* 107 N. C., 570.

In *Williams v. Lewis,* 158 N. C., 571, it was held that "as between signers of a negotiable instrument it may be shown who is principal and who is surety provided the rights of the payee are not injuriously affected." And, further, in *Smith v. Carr,* 128 N. C., 150, it is said: "However, their relationships, whether principal or surety, when questioned, become a matter of fact to be established by evidence, either written or oral, and found by the jury." *Forbes v. Sheppard,* 98 N. C.,

111; *Foster v. Davis,* 175 N. C., 541; *Kennedy v. Trust Co.,* 180 N. C., 225; *Gillam v. Walker,* 189 N. C., 189.

It will be observed that neither Finch nor Sanders was a party to the $14,090.00 note paid by Thomas H. Boykin and had no relationship whatever thereto. Sanders held a deed for one of the lots executed subsequently to the execution of the $14,090.00 note and the registration of the mortgage securing it. Finch held a second deed of trust upon lot No. 2, which was subject to the rights of the parties in and to the $14,090.00 note and the mortgage securing it.

So that, the rights and equities of both Sanders and Finch were subject to the rights of Thomas H. Boykin for the reason that both the deed of Sanders and the deed of trust of Finch were executed subsequently to the note and mortgage of $14,090.00 to Bailey Banking Co. Therefore, it is permissible, under the law, for Thomas H. Boykin to show by parol evidence that he was surety on the $14,090.00 note. If it should be found by the jury that he was surety on said note, then, nothing else appearing he would be entitled to the equity of subrogation, having discharged the note out of his own funds.

Finch and Sanders contend that, even if it be established that Thomas H. Boykin was a surety, his right of subrogation is destroyed by reason of the fact that he procured the cancellation of the mortgage securing the $14,090.00 note. The principle of law applicable to this contention is thus stated by *Justice Hoke* in *Davie v. Sprinkle,* 180 N. C., 582: "As to collateral paper held by the creditor, the surety, on payment of the principal debt, is ordinarily entitled to the full equitable doctrine of subrogation, but if he pays the principal debt on which he is himself bound, whether by judgment bond or other, without the assignment as suggested, the original obligation is extinguished and he becomes the simple contract creditor of the principal." *Hanner v. Douglass,* 57 N. C., 265; *Liles v. Rogers,* 113 N. C., 200; *Tripp v. Harris,* 154 N. C., 296; *Liverman v. Cahoon,* 156 N. C., 187.

Upon this principle of law, Thomas H. Boykin, having failed to have the mortgage assigned for his benefit, would lose his right of subrogation so far as the mortgage is concerned, but it appears from the record that the Bailey Banking Co. had reduced its note of $14,090.00 to judgment in a proceeding to foreclose the mortgage securing same. When this judgment was rendered the note, as evidence of indebtedness, was extinguished by the higher evidence of record. *Gibson v. Smith,* 63 N. C., 103. In other words, the judgment merged the debt upon which it was rendered. The rule is thus expressed in *Wagner v. Cochrane,* 35 Ill., 152, quoted with approval by *Ruffin, J.,* in *Grant v. Burgwyn,* 88 N. C., 99: "It is said that by judgment, the contract upon which it is based becomes entirely merged—loses all its vitality—and ceases to be obliga-

tory upon the parties. Its force and effect are wholly expended, and all remaining liability is transferred to the judgment, which then becomes the evidence, and the only evidence that can be used in a court, of the existence of the original debt."

Applying this rule of law to the case under consideration, we hold that the cancellation of the mortgage, after the debt had become merged in a judgment, did not of itself destroy the right of subrogation. It does not appear from the record whether the judgment has been canceled or whether it has been assigned for the benefit of Thomas H. Boykin. Neither does the date or form of the judgment appear.

We therefore express no opinion as to the rights of the parties under the judgment. An expression of opinion as to this matter in the present state of the record would tend to confuse rather than to clarify.

Reversed.

FRANK M. LEWIS v. RICHARD A. LEWIS.

(Filed 6 October, 1926.)

1. Limitations of Actions—Evidence—Adverse Possession—Wills.

Where the father has put his two sons in possession of his lands, allotting to each a definite portion, evidence in behalf of one that the land was a gift from their father, and that he had held his portion so allotted adversely for twenty years, is competent upon the question of his title as against a contrary disposition of the lands by will of the deceased father.

2. Appeal and Error—Instructions—Presumptions.

Where the charge of the court is not set forth in the record on appeal, it will be presumed to have been correctly given.

CIVIL ACTION before *Nunn, J.*, and a jury, at Spring Term, 1926, of PAMLICO.

Elijah Lewis, father of the plaintiff and the defendant, owned about fifty acres of land. Plaintiff alleges that in 1882 the said Elijah Lewis divided said land among his children, including the plaintiff and the defendant, and put the plaintiff in possession of the land in controversy, and the plaintiff, under said oral partition of land, has been in full possession and control of said land since 1882, and holds the same and has held the same since said date adversely. The defendant at the same time was put in possession of another parcel of said land. Elijah Lewis, father of the plaintiff and the defendant, left a last will and testament, making a different division of said land from the oral partition referred to, but this will was not probated until after a controversy arose between the parties, to wit, on 20 November, 1922. The defendant denied the

possession and ownership of the plaintiff. The question was submitted to a jury, and the jury found in favor of the plaintiff.

From judgment on the verdict the defendant appealed.

F. C. Brinson, Ward & Ward for plaintiff.
Z. V. Rawls for defendant.

PER CURIAM. The defendant objected to parol testimony of possession of the land in controversy by the plaintiff on the ground that it contradicted the will. It will be observed, however, that there was evidence tending to show that the parties were put in possession of their respective interests in said land by Elijah Lewis, the father, in 1882, and that the plaintiff therefore claims title under said oral partition and continuous adverse possession of said premises since said time. "A parol partition of land is not void but merely voidable, . . . and any evidence is admissible which tends to show either ratification of the partition or conduct from which the parties seeking to disregard it are held to be estopped in so doing." *Collier v. Paper Corporation,* 172 N. C., 74.

If a parol partition is made between tenants in common, and they severally take possession, each of his or her part, so allotted, and continue in the sole and exclusive possession since the allotment for a period of twenty years without the assertion of any claims or demands for rents, issues, or benefits by any of said tenants upon the others, but each recognizing the other's possession to be of right and hostile, the law will presume an actual ouster and a supervening adverse possession. *Rhea v. Craig,* 141 N. C., 602.

Under such circumstances parol evidence is permissible to show the facts constituting the possession, manner of acquiring it, and the length of time the possession has existed.

The defendant further excepts to a letter which was written by him to his brother, the plaintiff in this action, on 13 September, 1920. In this letter was the following statement: "You know that you have always had the privilege of it (the land in controversy) to suit yourself." The defendant contends that the letter was an offer of compromise. We do not so interpret it; but, even if it was an offer of compromise, the statement in the letter referred to is the distinct admission of an independent fact recognizing the possession of the plaintiff, and this independent fact is competent. *Baynes v. Harris,* 160 N. C., 307; *Montgomery v. Lewis,* 187 N. C., 577.

There was sufficient evidence upon the question to be submitted to the jury. The entire charge of the court is not in the record, and it must therefore be assumed that it was correct upon the question of possession and the effect of the will.

No error.

J. B. CRAWFORD v. MARY WILLOUGHBY AND HER HUSBAND, H. L. WILLOUGHBY.

(Filed 6 October, 1926.)

1. **Equity—Reformation of Instruments—Deeds and Conveyances—Mistake—Burden of Proof.**

Equity will not decree the reformation of a deed for the mistake of the draughtsman in not incorporating conditions in the instrument as both the parties had directed, unless the party seeking this relief establishes by strong, clear and cogent proof that the conditions omitted from the deed were substantial and material, and that it was an omission due solely to the mistake of the draughtsman, and upon which both parties had agreed.

2. **Same—Evidence—Appeal and Error.**

Where the grantor in a deed seeks to have it reformed so as to include a condition subsequent that the grantee was to take in remainder after the reservation of a life estate, upon the grantee's supporting him or providing him a home in his old age, etc., evidence tending to show that he had consulted an attorney who drew the conveyance as written, who had read it over to him after his stenographer had written it, that it was written in accordance with instructions given; that he then executed it and carried it away and delivered it to the grantee, and the only evidence in his favor testified to by himself found against him by the jury, was that he was too drunk to understand what he was doing, is insufficient to support a judgment ordering a reformation of the instrument rendered in the Superior Court.

APPEAL by defendants from *Nunn, J.*, at April Term, 1926, of PITT. New trial.

On 28 June, 1921, plaintiff executed a deed by which he conveyed to defendant, Mary Willoughby, the land described therein, reserving to himself, however, an estate therein for his life. The deed contains the following recitals:

"Whereas, the said Mary Willoughby is a cousin of the said J. B. Crawford, and has always been near and dear to him, and

Whereas, it is agreed and understood that the said Mary Willoughby has promised and does hereby promise the said J. B. Crawford a home for the remainder of his natural life; and

Whereas, the said J. B. Crawford is the owner of a certain farm in Beaver Dam Township, Pitt County, North Carolina:

Now, therefore, in consideration of the premises, and the natural love and affection which the said J. B. Crawford bears for his said cousin, Mary Willoughby, and of ten dollars to him paid by the said Mary Willoughby, the receipt of which is hereby acknowledged, the said J. B. Crawford, has bargained, sold and conveyed," etc.

Summons in this action was issued 11 October, 1922; in his complaint, plaintiff sets up two causes of action, and prays judgment that said deed be declared null and void, and of no effect, upon the allegations in each of said causes of action.

Plaintiff alleges:

First. That it was agreed between plaintiff and defendant that if plaintiff would execute a deed conveying to her his land, subject to his life estate, defendant and her husband would move to plaintiff's land, and there live with him and maintain and support him during the remainder of his life; that if at any time thereafter she failed and refused to perform her said agreement, the said deed should be null and void and of no effect;

That the said condition, to wit: That upon the failure of defendant to continue to live with plaintiff, and to maintain and support him, the said deed was to be null and void—was omitted from said deed by the mistake of the draughtsman; that plaintiff is an ignorant and illiterate man, and did not discover, until after the deed had been delivered and recorded, that said condition had been omitted from the deed; that defendant has failed to perform said conditions; wherefore plaintiff prays that said deed be reformed by incorporating therein said condition, and that it be adjudged that defendant has forfeited all right, title and estate in and to said land, under the deed.

Second. That at the time of the execution of said deed, plaintiff was under the influence of intoxicating liquors to such an extent, that he did not have sufficient mental capacity to execute a deed; that defendants, by fraudulent acts and conduct, as alleged in the complaint, procured the execution of said deed by plaintiff; wherefore plaintiff prays judgment that said deed be canceled and set aside.

The verdict of the jury was as follows:

"1. Was the condition 'that if at any time thereafter she failed and refused to live with the plaintiff, and maintain and nurse him in his sickness and care for him in his old age, said deed was to be null and void and of no effect,' left out of the deed executed by plaintiff to defendant through the mistake of the draughtsman? Answer: Yes.

2. If so, has defendant failed to perform said condition? Answer. Yes.

3. Was the plaintiff at the time of the execution of the deed to the defendant under the influence of intoxicating liquors to such an extent as to render him incapable of having sufficient mental capacity to execute a deed? Answer: No.

4. Did the defendant and her husband by their fraudulent acts and conduct as alleged in the complaint, secure the execution of the deed from plaintiff to defendant? Answer: No.

5. Did defendant fraudulently fail and refuse to render said services to the plaintiff? Answer: No."

Upon the said verdict, it was ordered and decreed that the deed be reformed as prayed by plaintiffs, and that the defendant, Mary Willoughby, had forfeited all right, title and estate in and to the land described therein, and that said deed be canceled and set aside. From the judgment rendered, defendants appealed to the Supreme Court.

F. G. James & Son, Albion Dunn for plaintiff.
Julius Brown, L. W. Gaylord for defendants.

CONNOR, J. Plaintiff having failed to sustain the allegations upon which he sought relief on the second cause of action set out in his complaint, defendants present to this Court, on their appeal, only their assignments of error, based upon exceptions pertinent to the first cause of action. They rely chiefly upon their exception to the refusal of the court to allow their motion for judgment as of nonsuit, made at the close of all the evidence, under C. S., 567.

The principle that a Court of Equity, or a court exercising equitable jurisdiction, will decree the reformation of a deed or written instrument, from which a stipulation of the parties, with respect to some material matter, has been omitted by the mistake or inadvertence of the draughtsman, is well settled, and frequently applied. *Strickland v. Shearon,* 191 N. C., 560. The equity for the reformation of a deed or written instrument extends to the inadvertence or mistake of the draughtsman who writes the deed or instrument. If he fails to express the terms as agreed upon by the parties, the deed or instrument will be so corrected as to be brought into harmony with the true intention of the parties. *Sills v. Ford,* 171 N. C., 733. All the authorities are agreed, says *Hoke, J.,* in *King v. Hobbs,* 139 N. C., 170, that a deed or written instrument will be reformed so as to express the true intent of the parties when by a mistake or inadvertence of the draughtsman a material stipulation has been omitted from the deed or instrument as written. If the deed or written instrument fails to express the true intention of the parties, it may be reformed by a judgment or decree of the Court, to the end that it shall express such intent whether the failure is due to mutual mistake of the parties, *Maxwell v. Bank,* 175 N. C., 183, to the mistake of one, and the fraud of the other party, *Potato Co. v. Jeanette,* 174 N. C., 236, or to the mistake of the draughtsman, *Pelletier v. Cooperage Co.,* 158 N. C., 405.

The party asking for relief by reformation of a deed or written instrument, must allege and prove, first, that a material stipulation, as alleged, was agreed upon by the parties, to be incorporated in the deed or

instrument as written, and second, that such stipulation was omitted from the deed or instrument as written, by mistake, either of both parties, or of one party, induced by the fraud of the other, or by the mistake of the draughtsman. Equity will give relief by reformation only when a mistake has been made, and the deed or written instrument because of the mistake does not express the true intent of both parties. The mistake of one party to the deed, or instrument, alone, not induced by the fraud of the other, affords no ground for relief by reformation.

Walker, J., in *Long v. Guaranty Co.*, 178 N. C., 503, speaking of the distinction between cancellation or rescission and reformation of a written instrument, says: "A noted text writer says that courts of equity do not grant the high remedy of reformation upon a probability, or even upon a mere preponderance of evidence, but only upon a certainty of error. Pomeroy on Eq. Jur., sec. 859. . . . A person who seeks to rectify a deed on the ground of mistake must establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made comformable continued concurrently in the minds of all parties down to the time of its execution; and also must be able to show exactly and precisely the form to which the deed ought to have been brought, and that the omission of some material thing was caused by their mistake. To reform a contract, and then enforce it in its new shape, calls for a much greater exercise of the power of a chancellor than simply to set the transaction aside. Reformation is a much more delicate remedy than rescission. Hence, in order to justify a decree of reformation in cases of pure mistake, it is necessary that the mistake should have been mutual." A court of equity cannot, and should not undertake to make a new contract between the parties by reformation; it may by cancellation or rescission relieve a party from an alleged contractual obligation or liability, which he has in fact not undertaken or incurred; it cannot, however, impose upon him a liability which he has not assumed, or an obligation which he has not undertaken. *Allen v. R. R.*, 171 N. C., 339; *Shook v. Love*, 170 N. C., 99; *Dickey v. Cooper*, 170 N. C., 489.

The stipulation or condition, alleged in the complaint to have been agreed upon by the parties, and omitted from the deed by the draughtsman, was material to the relief sought by plaintiff upon his first cause of action; the recitals in the deed are clearly not sufficient, under the decisions of this Court, to impose upon defendant's estate in the land, conveyed to her by plaintiff, a condition subsequent, to be enforced by the forfeiture of her estate. Whether such recitals can be construed as constituting a covenant, for the breach of which plaintiff can recover damages, is not presented on this record. The learned counsel who drew the complaint in this action was evidently of the opinion, that under

our decisions, a forfeiture could not be decreed, unless the deed was reformed by incorporating therein the condition alleged to have been agreed upon by the parties and omitted by the mistake of the draughtsman. The distinction between covenants, to be enforced by damages, and conditions subsequent, to be enforced by forfeiture, has been frequently discussed and applied by this Court. See *Cook v. Sink,* 190 N. C., 620; *Askew v. Dildy,* 188 N. C., 147; *Fleming v. Motz,* 187 N. C., 593; *Hinton v. Vinson,* 180 N. C., 393; *Bailey v. Bailey,* 172 N. C., 671; *Shook v. Love,* 170 N. C., 101; *Brittain v. Taylor,* 168 N. C., 271; *Helms v. Helms,* 135 N. C., 164; *S. c.,* 137 N. C., 207.

The evidence submitted to the jury, pertinent to the first issue, involving the allegations with respect to the agreement alleged to have been entered into by plaintiff and defendant, and the omission of such agreement from the deed by the draughtsman, tends to show that plaintiff, a childless widower, of about 63 years of age, had frequently expressed a purpose to "give" his land to defendant, a cousin, at whose home he was a frequent visitor; that defendant had promised to take care of him and to provide a home for him; that on 28 June, 1921, plaintiff requested defendant to go with him to Farmville, N. C.; that she complied with this request, and that when they arrived at Farmville, plaintiff left defendant and went to the office of an attorney; that he requested the attorney to write a deed, advising him of his wishes and purposes; that the attorney, after discussing the matter at length with plaintiff, advising him of the difference in effect between a will and a deed with reservation of a life estate in the grantor, dictated the deed to his stenographer, who was the only other person present in the office at the time; that after she had written the deed, it was read by the attorney to plaintiff, who thereupon signed it and acknowledged its execution before a notary public; that plaintiff then went to defendant and delivered the deed to her. Plaintiff and defendant then went to the county seat; the deed was probated and recorded on the same day that it was executed.

Plaintiff testified that he was so drunk when he went into the office of the attorney at Farmville that he was unable to remember his conversation with the attorney; he thus accounts for his failure to testify as to his conversation with the attorney or as to his instructions to him relative to the drawing of the deed. Both the attorney and his stenographer testified that plaintiff was not drunk while he was in the office, and the jury has so found. The testimony of both the attorney and the stenographer was to the effect that the deed was written in accordance with the instructions of plaintiff, after he had been fully advised by the attorney of its legal effect as a conveyance of his land to defendant.

There is no evidence set out in the case on appeal upon which the first issue can be answered in the affirmative; the evidence does not sustain

the allegations of the complaint, constituting the first cause of action, either as to an agreement between plaintiff and defendant with respect to the condition, or as to the omission of such agreement from the deed as written by the draughtsman. Defendant's motion for judgment as of nonsuit should have been allowed. There was error in refusing to allow the motion.

It is needless to consider other assignments of error, based upon numerous exceptions appearing in the case on appeal. Since the trial of this action plaintiff has died; his only heir at law has been substituted as plaintiff in the action and has prosecuted this appeal. For the error in refusing to allow the motion for judgment of nonsuit, there must be a New trial.

BOARD OF EDUCATION OF SAMPSON COUNTY ET AL. v. BOARD OF COMMISSIONERS OF SAMPSON COUNTY ET AL.

(Filed 13 October, 1926.)

1. Judgments—Consent—Mandamus—Schools—Attorney and Client.

Where pending proceedings by the county board of education to compel the county board of commissioners to provide funds for the purchase of certain lands for public school purposes, resisted upon the ground that certain statutory requirements had not been met by the plaintiffs in the action, both parties had agreed that the trial judge enter a consent order as to the purchase of the lands, the judgment accordingly entered is that of the agreement of the parties, not requiring the signature of the attorneys appearing thereon evidencing their consent.

2. Same—Vacated only by Mutual Consent.

Where in accordance with the agreement of the parties a judgment by consent has been entered by the court, it may not thereafter be vacated by the order of the court which had entered it of record, without the consent of both parties to the litigation.

3. Same—District—Committee—Parties—Statutes.

In proceedings for mandamus by the county board of education to compel the county board of commissioners to provide funds for the purchase of lands selected by the plaintiffs for the establishment of a public school of a district within the county, the local school committee is not a necessary party, and its consent is not required under our statute to the validity of a judgment entered upon the consent of the county school board and the county commissioners. C. S., 5419, 5423.

4. Same—Procedure—Order of Subsequent Superior Court Judge Reinstating Consent Judgment—Appeal and Error.

Where the Superior Court judge has entered a valid consent judgment in proceedings for mandamus, in an action by the county board of educa-

tion against the county commissioners, in respect to the buying of lands to establish a public school within a district of the county, he may not thereafter vacate the judgment upon the erroneous ground that a valid consent had not been obtained, and retain the cause upon the docket, and the subsequent order of a judge regularly holding the courts of the district, reinstating the consent judgment, will be upheld on appeal.

CIVIL ACTION, before *Bond, J.*, at March Term, 1926, of SAMPSON.

This action was instituted by the board of education of Sampson County and certain individuals constituting the school committee of Shady Grove School District of said county against board of county commissioners and the treasurer of the county. The action was instituted for the purpose of securing a writ of mandamus requiring the board of commissioners to provide sufficient funds for the erection of adequate school buildings in the Shady Grove School District, and for requiring the treasurer to pay a voucher issued by the board of education in payment of a school site. The defendants answered, setting up the defense that the board of education had presented no proper budget as required by statute, and that the location of the school did not conform "to what the commissioners of Sampson County deem a wise and economical plan of county-wide organization." And, further, that no proper plan for county-wide organization had ever been legally adopted by the plaintiff board.

All matters of defense set up by the defendant in its answer were denied in a reply filed by the plaintiff board, and the issue clearly drawn.

Thereafter, by consent, the application for mandamus was heard before his Honor, Henry A. Grady, resident judge of the Sixth Judicial District, at the courthouse in Clinton, on 12 February, 1926, during term time.

Thereafter, on 4 March, the following judgment was entered by Grady, J.: "This cause coming on to be heard before his Honor, Henry A. Grady, judge, the court, from the pleadings and exhibits filed, finds the following facts:

1. That the erection of a school building in Shady Grove School District is necessary for the carrying on of a six months school therein.

2. That the plaintiff board of education, at its regular meeting on the first Monday in March, 1926, adopted a resolution in words and figures as follows:

Whereas, it is made known to the board of education at its regular meeting on the first Monday in March, 1926, that the board of county commissioners have agreed that the location of the new high school site may be at the old Shady Grove school site, located at the intersection

of the Fayetteville and Goldsboro road, and the Clinton and Averasboro road, known as the Peter Jackson Cross Roads; and, whereas, the establishment of said site is in litigation and it is probable that the litigation may be prolonged and costly, and in the meantime the educational interest of the county, and especially that section thereof, will suffer greatly:

Now, therefore, be it resolved by the board of education:

First. That the said site above referred to is hereby accepted and adopted as the location for the high school building to serve Shady Grove, Mingo and Pine Forest districts, and other contiguous territory.

Second. That said board of education take immediate steps to reclaim the old site and location of two acres and add thereto three additional acres, either by purchase or condemnation proceedings, and to this end L. E. Whitfield, Esq., is hereby requested to immediately lay off the site of five acres, including the old site, and location of two acres, formerly known as the Old Shady Grove school site, so that the building may be constructed at once under the general plan and contract entered into with Mr. Hudson, of Tarboro, N. C.

Third. It is further considered that all resolutions and orders of this board in respect to the location of this new high school be rescinded in so far as the same are in conflict with this resolution.

Fourth. And upon the approval of this resolution by the board of county commissioners, his Honor, Henry A. Grady, before whom this litigation is now pending, may make a final order or judgment embodying the terms of this agreement.

3. That at its regular session held on the same day the defendant board of commissioners of Sampson County, accepted and approved said resolution of the board of education, said approval appearing on the minutes of said board of said date as follows:

The above resolution is approved by the board of county commissioners that the new schoolhouse be located at the old Shady Grove site.

It is therefore considered, adjudged and decreed by the court that the location of the said school building as set forth in the resolution of the board of education be, and the same is hereby adopted, ratified and approved by the court, and the defendant, board of commissioners, are authorized, ordered and directed to provide funds sufficient to acquire a site for said building as herein located, and in addition thereto sufficient funds to meet the contract price for the erection of said building as entered into and agreed upon between the board of education and J. W. Hudson, Jr., and between the board of education and the Demott

Heating Company, respectively, the substance of the original contract between said parties being set forth in the pleadings in this cause and appearing upon the minutes of the board of education.

It is further adjudged that the cost be taxed one-half against the plaintiff board and one-half against the defendant board, to be ascertained by the clerk of this court. Henry A. Grady, resident judge of the Sixth Judicial District. By consent."

Two days thereafter, to wit, on 6 March, 1926, Judge Grady signed another judgment in said action as follows:

"This cause coming on to be heard before Henry A. Grady, resident judge of the Sixth Judicial District, this 6 March, 1926, and it appearing to the court that a judgment was entered in this cause on 4 March, 1926, reciting certain resolutions passed by the board of education, and the acceptance thereof by the board of commissioners, wherein it was stipulated that the school building therein referred to should be located as stated in said resolutions adopted by the plaintiff board of education; and, whereas, the said judgment was signed by the court under the impression that it was entered by consent of all parties, plaintiff and defendant; and, whereas, it now appears that such consent did not exist as to all of the plaintiffs; now, therefore, adjudge that said former judgment be, and the same is hereby stricken out and declared utterly void; and this cause is continued to be heard by Hon. Wm. M. Bond, judge presiding, at March Term, 1926, of Sampson Superior Court. Henry A. Grady, judge presiding."

That thereafter, on 20 March, 1926, the matter was heard before W. M. Bond, judge presiding, at March Term of the Superior Court, who found the facts and entered judgment as follows:

"Thereupon it is considered and adjudged:

"First. That the judgment as prepared by counsel for the plaintiff, board of education, and the defendant, board of county commissioners, as set out in finding of fact No. 6 hereof, upon being signed by his Honor, Henry A. Grady, was a valid and binding judgment upon said two boards as by consent, regardless of the fact that counsel did not actually sign their names to said judgment, since under the resolution of the board of education, as approved by the board of county commissioners, no consent of counsel was required to the final order to be signed by Judge Grady carrying into effect the terms of the agreement between said two boards.

"Second. That the action of the board of education at its special meeting held on 8 March, 1926, wherein said board passed a resolution vacating and annulling the resolution theretofore adopted on 1 March, 1926, and which was approved by the board of county com-

missioners, was unwarranted and ineffectual to change the school site as fixed in the resolution of 1 March, 1926.

"Third. That the order entered by his Honor, Judge Grady, on 6 March, 1926, wherein he undertook to vacate the judgments signed by him, and prepared by counsel for plaintiff and defendant boards, as set out in finding of fact Nos. 6 and 7, was ineffectual for that purpose, since said first judgment was in effect a consent judgment between said two boards, and could not be vacated except upon notice and by consent of defendant board of commissioners.

"Fourth. That the parties named as local school committeemen, plaintiffs in this action, are unnecessary parties and were bound by the compromise resolution adopted by the two boards on 1 March, 1926.

"Fifth. That the last order of his Honor, Judge Grady, be vacated and that the formal judgment as signed by him is now declared and adjudged to have been a final determination of this cause.

W. M. BOND, *Judge Presiding.*"

From the foregoing judgment the plaintiffs appealed.

Henry E. Faison, Jesse F. Wilson, Godwin & Williams, for plaintiffs.

A. McL. Graham, Butler & Herring, and Faircloth & Fisher for defendants.

BROGDEN. J. After the issue had been clearly and sharply drawn in this case, on 12 February, 1926, before Grady, J., the board of education, in regular session, on 1 March, 1926, adopted a resolution selecting a suitable site for said school. On the same day the board of county commissioners, in regular session, approved the site so selected.

The resolution of the board of education of 1 March, contained, among other things, this clause: "and upon approval of this resolution by the board of county commissioners, his Honor, Henry A. Grady, before whom this litigation is now pending, may make a final order or a judgment embodying the terms of the agreement."

Thereafter, in pursuance of the agreement, Judge Grady signed the judgment of 4 March. This judgment, thereupon, by operation of law, became a consent judgment.

The nature, effect and characteristics of a consent judgment are firmly established by an unbroken and unquestioned line of decisions. *Clarkson, J.,* in *Bank v. Mitchell,* 191 N. C., 193, thus states the principle: "If parties have the authority, a consent judgment cannot be changed, altered or set aside without the consent of the parties to it. The judgment, being by consent, is to be construed as any other contract of the parties. It constitutes the agreement made between the

parties and a matter of record by the court, at their request. The judgment, being a contract, can only be set aside on the ground of fraud or mutual mistake."

The law will not even inquire into the reason for making a decree, it being considered in truth the decree of the parties, though it be also the decree of the court, and their will stands as a sufficient reason for it. *Bank v. Mitchell,* 191 N. C., 193; *McEachern v. Kerchner,* 90 N. C., 177; *Vaughan v. Gooch,* 92 N. C., 524; *Westhall v. Hoyle,* 141 N. C., 337; *Chemical Co. v. Bass,* 175 N. C., 426; *Morris v. Patterson,* 180 N. C., 484.

It does not appear from this record that any notice was given to the defendant or an opportunity to be heard before said judgment of 6 March was entered. Neither does it appear that there was any evidence of fraud or mutual mistake inhering in the consent judgment of 1 March. Therefore, under the law, the judgment of Grady, J., on 6 March, vacating the consent judgment of 1 March, was ineffectual. In addition, Judge Bond finds, as a fact, that the judgment of 1 March was a consent judgment.

It would seem from the record that the reason Judge Grady, on 6 March, attempted to strike out the consent judgment of 1 March, was due to the fact that the individual plaintiffs, constituting the school committee of Shady Grove School District, were not apprised of the judgment and did not consent thereto. Judge Bond ruled "that these individuals were unnecessary parties and were bound by the compromise resolution adopted by the two boards on 1 March, 1926." This ruling is correct. The local school committee asked for no affirmative relief and are charged with no duty in locating suitable sites for county school buildings.

C. S., 5419, provides that the county board of education shall be a body corporate, and shall prosecute and defend suits for or against the corporation. C. S., 5423, provides that the county board of education shall institute all actions, suits or proceedings against persons or corporations "for the recovery, preservation, and application of all moneys or property which may be due to or should be applied to the support and maintenance of the schools."

One of the causes of action for the mandamus was to require the board of county commissioners to provide sufficient funds for the maintenance of schools in Sampson County. This cause of action, under our statute, could be maintained only by the county board of education, so that the consent of the local school committee was immaterial. The judgment must be

Affirmed.

J. H. CLARK, J. T. McARTHUR AND J. D. McARTHUR v. ATLANTIC COAST LINE RAILROAD COMPANY, A CORPORATION.

(Filed 13 October, 1926.)

1. **Railroads—Judgments—Consent Judgments—Easements—Notice.**

A paper-writing executed by the plaintiffs' predecessor in title, duly registered, that the defendant should construct certain ditches and keep them open, etc., for the flow of the surface water, creates an easement upon the plaintiff's land, in accordance with the intent and purpose of the writing, and gives notice to the plaintiffs' successors in title, the plaintiffs in the present action.

2. **Same—Purchaser With Notice—Id Certum Est Quod Certum Reddi Potest.**

Where certain easements are created on lands in favor of a railroad in relation to maintaining ditches on lands, etc., those who afterwards acquire title are fixed with knowledge of the location of these ditches and the extent of the easement acquired by the railroad, when the original location of the ditches, etc., may be definitely ascertained, under the principle of *id certum est quod certum reddi potest.*

3. **Same—Notice—Appeal and Error—New Trials.**

In an action to recover damages to crops, etc., against defendant railroad company, alleged to have been caused to plaintiffs' lands by ditches cut for carrying off surface waters, parol evidence of such damages contrary to the easement granted by the plaintiffs' predecessor in title, of which plaintiffs had constructive notice, is prejudicial to the defendant, and constitutes reversible error.

4. **Carriers—Railroads—Easements—Drainage—Conditions — Negligence —Damages.**

Where a railroad company has acquired an easement in lands to cut certain ditches for draining, upon condition to keep them open or unobstructed, it is liable for damages to the land caused by its failure to comply with the conditions set forth in the easement.

5. **Pleadings—Allegations.**

Held, under our Code procedure, the allegations of the complaint were sufficiently definite to allege a cause of action against the railroad company for damages to land caused by its negligent failure to maintain a proper drainage of its right of way under the easement contract.

APPEAL by defendant from *Bond, J.*, and a jury, at June Term, 1926, of LENOIR. New trial.

The necessary facts will be stated in the opinion.

Sutton & Greene and Shaw, Jones & Jones for plaintiffs.
Rouse & Rouse for defendant.

CLARKSON, J. This action is for the recovery of alleged damage from the overflow of water from the ditches along the defendant's track. The defendant denied negligence and that the plaintiff has been damaged, and pleaded and relied upon an agreement in bar of recovery made and entered into between the predecessors in the title of the plaintiffs, which is set out in the answer.

John L. Nelson and wife, Mary A. Nelson, instituted an action in Superior Court of Lenoir County, N. C., at January Term, 1900, against the Wilmington and Weldon Railroad Company. In their complaint in that action they alleged that they were owners of 380 acres of land where they resided; that in 1891 defendant constructed its railroad across their land about 1,500 yards; that the railroad company, in constructing its road across their land, negligently, wrongfully and unlawfully filled up eight of their ditches, which were necessary for the proper drainage of their land for agricultural purposes and the defendant failed to provide sufficient outlet for the waters accumulating on and from said land theretofore well drained, causing the water to back up and pond on the land and rendering about twenty acres worthless and unfit for cultivation; that defendant cut ditches beside its road and on their land which extend beyond their land across an adjacent water shed, whereby defendant diverts large volumes of water from its natural course and flow and empties same on their land without providing adequate outlet; that the waters so diverted and the water from their ditches being filled, floods their land at every considerable rainfall to the great damage of plaintiffs' land and crops for the three years preceding the action. The Wilmington and Weldon Railroad Company answered denying the material allegations, and as a defense say: "That the damages, if any, to the plaintiffs' lands were and are caused by the construction of its roadbed, ditches and other works of a necessary and permanent nature in 1891, at the time of the building of its road, and that more than five years have elapsed from that time before the institution of this action."

The Atlantic Coast Line Railroad took over the Wilmington & Weldon Railroad Company, and at March Term, 1903, the judgment rendered was "It is by consent adjudged that the plaintiffs be nonsuited," etc.

A paper-writing in the record, relied on by defendant in the present action to bar a recovery, was executed by J. L. Nelson and wife, Martha A. Nelson, R. L. Blow and wife Retha Blow, M. A. Byrd and wife, Reba Byrd, under seal, to Wilmington and Weldon Railroad Company, dated 24 March, 1903, filed for registration 30 March, 1903, in the register's office of Lenoir County, Book 28, pages 533-4.

It is admitted by plaintiffs that they are the owners of the "Byrd Farm," successors in title to some of the parties who signed the paper-writing (M. A. Byrd and wife Reba Byrd), and the land in controversy for which damages are claimed are a portion of the lands embraced in the paper-writing, and the grantors of plaintiffs were parties to the agreement. With this agreement on record, plaintiffs purchased 100.7 acres of the land 11 October, from M. A. Byrd and wife, Reba Byrd, and started the present action 23 June, 1924.

Plaintiffs allege, in part: That in the construction of its said line of railroad the defendant constructed said ditches located along and on each side of its tracks, for the purpose of draining its right of way and for the purpose of carrying off such surface waters as would, if said railroad were not there located, flow across the lands embraced in such right of way; and the plaintiffs are advised, and believe, and upon such information and belief allege, that it is the duty of the defendant to keep and maintain said ditches in such a manner as will fulfill the purpose for which they were made and so as to prevent damage to the adjacent lands and property which would be caused by waters overflowing from the said ditches. That the defendant, disregarding its duty in the premises, and in violation of the rights of the plaintiff, has negligently, unlawfully, and wrongfully allowed said ditches to become filled up, so that they fail to carry off the waters which are collected upon the defendant's said right of way as it traverses the lands of the plaintiffs, and the said waters on the north side of said right of way are dammed up and ponded, and on the south side thereof are overflowed, upon and across the lands of the plaintiffs.

That this has continued for more than three years preceding the action, and by reason of the overflowing waters negligently dammed up by defendant upon, over and across the plaintiffs' lands, about 25 acres have been in the last three years rendered unproductive, etc., and asks damages.

We now come to consider the paper-writing, which was duly recorded, relied on by defendant to bar plaintiffs' right of action or under which a right of action exists in behalf of plaintiffs. This paper-writing was signed by John L. Nelson and others, including M. A. Byrd and wife, Reba Byrd, through whom plaintiffs claim. The consideration is set forth, the land definitely described, which included the part of the land now in controversy for which damages are claimed. It releases and discharges "the Atlantic Coast Line Railroad Company of and from all claims, demands, actions and causes which we, or either of us now have or may have at any time hereafter have (*provided* the ditches shall be

cut on the right of way of the said railroad company by said company and shall be kept cleaned out on said right of way by said company as agreed) against the said Atlantic Coast Line Railroad Company for any and all damages to the lands now owned by us situate on both sides of the railroad of said corporation of Lenoir County adjoining the lands of B. W. Canady on the north and Fred Jones on the south; and also to all crops heretofore planted and cultivated upon the said lands, or may hereafter be damaged by overflow from water from ditches now in service on the right of way of said railroad company, *provided* the said company shall cut out and place the said ditches on the right of way in the condition that has been agreed upon between us and said company, and shall keep the said ditches cleaned out and in the condition agreed upon between the parties hereto, and upon compliance therewith no damages shall hereafter be claimed or be recoverable by us, our heirs or assigns. It is understood and agreed that the said J. L. Nelson and wife, their heirs and assigns shall have the right to open such old ditches now in use as may be needed in the drainage of said lands hereinbefore mentioned and to empty them into the said ditches on said right of way. *It is the intention of these presents for the consideration aforesaid to release and discharge the said Atlantic Coast Line Railroad Company from damages to the said lands and all crops which may have been damaged, or may be damaged in the future by the overflow or diversion of water caused by the ditches now in use, provided the said ditches are kept open as agreed upon on said right of way.*"

The question presented to us: What effect, in construing the paper-writing, does it have on the rights of plaintiffs? The paper-writing is executed under seal, and we think is in the nature of an easement, and is an interest in land within the meaning of the statute of frauds. 9 R. C. L., sec. 3.

A bona fide purchaser of land, without knowledge or actual or constructive notice of the existence of an easement, takes title to the same relieved of the burden or charge of the easement. The right itself is an interest in land—the instrument creating it ordinarily must be recorded and from the recording is constructive notice. 9 R. C. L., sec. 61; *Green v. Miller,* 161 N. C., 31-2.

In *Walker v. Venters,* 148 N. C., 388, it is said: "It is true that a contract may be partly in writing and partly oral (except when forbidden by the statute of frauds), and that in such cases the oral part of the agreement may be shown. But this is subject to the well-settled rule that a contemporaneous agreement shall not contradict that which is written. The written word abides, and is not to be set aside upon the slippery memory of men, citing *Basnight v. Jobbing Co.*, 148 N. C.,

350; *Cherokee County v. Meroney,* 173 N. C., 655"; *Atkinson Co. v. Harvester Co.,* 191 N. C., 296.

The two *"provided"* in the body of the paper-writing are indefinite and uncertain and in parol, and no notice to plaintiffs. The latter part of the paper-writing is definite and certain and notice to plaintiffs. In fact, it makes certain the paper-writing by saying, "it is the intention," etc. It further says for the consideration of the aforesaid, releases and discharges the A. C. L. Railroad from all damages present and prospective to the lands and all crops *by the overflow or diversion of water caused by the ditches now in use.* It was notice to plaintiffs—ditches now in use could be ascertained. *Id certum est quod certum reddi potest.* That is certain which can be made certain. *Green v. Harshaw,* 187 N. C., p. 220; *Douglas v. Rhodes,* 188 N. C., 584.

The proviso requires the ditches now in use to be kept open as agreed upon on the right of way. Defendant pleads the paper-writing as a defense and relies on it, and claims the benefit under it, and consequently must be responsible for the burdens and keep the ditches on the right of way open as agreed upon. Plaintiffs have a right of action under this particular proviso. Under our liberal practice, we think the allegations in the complaint sufficient, and that the issue should be limited to this view of the case.

Many exceptions and assignments of error were made to questions and answers to certain testimony. The force of these objections are made clear, as they are similar to the objection and assignment of error relating to the testimony of G. T. McArthur, in which he says: "This is lower land here than for about three-fourths of a mile up this way, and the railroad coming through this hill they cut down through the hill, and of course the water comes through that low place in there on down side of the railroad till it gets down to our place, and down to our place the railroad is about five or six feet higher than our land, and so when the water gets down to our land, the water goes all over our land because of not having sufficient ditch through our land to take care of the water. That same condition exists up to the present time."

On this and like evidence the court below reserved its decision, but finally admitted it. In this we think there was error. The paper-writing, as we construe it, was to create, or in the nature of an easement, and the consideration paid was to release and discharge the defendant from all damages then due and prospective for the very injury which this testimony, if allowed and believed, would aid plaintiffs in the present action. The easement—paper-writing—entitles plaintiffs to recover against the defendant, if the facts permit, solely and only for not keeping open the ditches in use at the time the paper-writing was signed and recovery in this action is limited to three years, in accordance with the pleadings.

Plaintiffs purchased the 100.7 acres in 1919 from the Byrds, who signed the easement—paper-writing—on 24 March, 1903. This suit was brought 23 June, 1924. It nowhere appears in the record in all these years that the Byrds ever made any claim or demand on the defendant. From the facts and circumstances of this case, we think any other holding would be unjust to defendant.

For the reasons given there must be a

New trial.

JANNIE LEE JAMES ET AL. v. E. A. GRIFFIN.

(Filed 13 October, 1926.)

1. **Estates—Remainders—Contingent Interests—Deeds and Conveyances—Release—Descendible Estate.**

   A contingent interest in land is generally descendible, and may be released by the contingent remainderman if specified in the instrument creating it, and he can be clearly identified.

2. **Same.**

   A devise of an estate for life to the mother of the testatrix, upon her death to the daughter of testatrix, her heirs, executors and administrators, but in the event the daughter should die in the testatrix's lifetime or in the lifetime of the testatrix's mother, or thereafter without issue of her body living at the time of her death, then to the husband of the testatrix: *Held*, the daughter acquired a fee-simple title defeasible upon her dying without issue of her body living at the time of her death, and the husband being specified and certain as to the one taking upon this contingency, a deed from him to the daughter will convey his interest to her, and the daughter's deed to another a fee-simple title.

3. **Deeds and Conveyances—After Acquired Title—Estoppel.**

   Where one takes a defeasible fee in lands by devise, conveys the fee-simple title with full covenants and warranty, and afterwards acquires the fee, he is estopped as against his grantee and those claiming under him from denying his title at the time of his deed.

APPEAL by defendant from *Cranmer, J.*, at August Term, 1926, of WAYNE. Affirmed.

Langston, Allen & Taylor for plaintiffs.

W. B. Yelverton for defendant.

ADAMS, J. This appeal is prosecuted for the review of a judgment rendered upon an agreed statement of facts. The defendant contracted to purchase the land in question, but refused to accept the deed ten-

dered by the plaintiffs for the alleged reason that they could not convey an estate in fee. The plaintiffs trace their title through mesne conveyance back to Nina Dillon, who died leaving a last will and testament dated 8 February, 1882. The material item of the will is as follows:

"I do hereby devise and bequeath unto my beloved mother, Eliza Nixon, all of my estate of every kind to have and to hold the same for and during the term of her natural life, and upon the death of my mother, the said Eliza Nixon, I devise and bequeath all of my said estate unto my daughter, Harriet N. Dillon, to have and to hold the same to her, her heirs, executors and administrators, and in the event that my said daughter, Harriet N. Dillon, should die in my lifetime, or in the lifetime of my said mother, or after her death, without issue of her body living at the time of her death, I devise and bequeath all of my said estate to my said husband, Daniel Dillon, to have and to hold the same to him, his heirs, executors and administrators."

On 1 July, 1901, Harriet N. Dillon, who was unmarried, executed and delivered to Henry Weil and others a deed for the land described in this item with full covenants and warranties sufficient in form to convey the fee; and on 8 July, 1901, Daniel Dillon, also unmarried, conveyed to Harriet N. Dillon all his right, title and interest in the same land. Eliza Nixon died in 1885; Harriet N. Dillon is living, is about fifty years of age, and has never married; Daniel Dillon died in 1905, leaving Harriet as his only heir at law. The two questions are whether the deed to Henry Weil and others conveyed a fee and whether the plaintiffs can convey a like title to the defendant.

Under the will of Nina Dillon her daughter Harriet acquired a fee defeasible upon her dying without issue of her body living at her death; and the interest of Daniel Dillon was contingent upon this event. *Bodenhamer v. Welch,* 89 N. C., 78; *Whitfield v. Garris,* 134 N. C., 24; *Smith v. Lumber Co.,* 155 N. C., 389. Nothing else appearing Harriet could not convey the fee; but she is the only heir of the contingent remainderman and is the grantee in a deed conveying his interest in the land. A contingent interest in land is generally descendible and devisable; it may also be released if the contingent remainderman is specified and known. Here the ulterior remainderman is particularly designated in the will. *Christopher v. Wilson,* 188 N. C., 757; *Malloy v. Acheson,* 179 N. C., 90; *Hobgood v. Hobgood,* 169 N. C., 485; *Cheek v. Walker,* 138 N. C., 446; *Kornegay v. Miller,* 137 N. C., 668.

It is true the deed from Harriet N. Dillon to Henry Weil and others antedates her deed from Daniel Dillon; but she conveyed with full

covenants and warranties and is estopped as against her grantees to set up any subsequently acquired title. *Hallyburton v. Slagle,* 132 N. C., 947; *Bank v. Glenn,* 68 N. C., 36; *Hassell v. Walker,* 50 N. C., 270; *Moore v. Willis,* 9 N. C., 555. It follows that both the questions proposed should be given an affirmative answer. The judgment is therefore

Affirmed.

OTIS LANE v. SOUTHERN RAILWAY COMPANY.

(Filed 13 October, 1926.)

1. Evidence—Depositions—Notice—Waiver.

Where the plaintiff resists defendant's motion for the continuance of the trial of the case then in progress on account of the sickness of a witness in the same city, but in consequence of his offer to waive the formality of notice to take the witness's deposition, the court orders the taking of the deposition in order that the trial may proceed, the plaintiff's waiver does not include his right to object upon the trial at his first opportunity to the competency of portions of the evidence so taken, and the ruling of the court thereon in his favor is not erroneous.

2. Appeal and Error—Evidence—Objections and Exceptions—Broadside Exceptions.

Where depositions are read in evidence in defendant's behalf, and the court stated that he will exclude that which relates to a phase of the controversy contradictory of the allegations of contributory negligence, the plaintiff's exception does not meet the requirement that objectionable evidence should be specifically objected to by the appellant, and his exception is too broadly stated to be considered on appeal.

3. Negligence—Torts—Damages—Proximate Cause.

The rule awarding damages against a wrongdoer to the person thereby injured, is such amount as will compensate him for the injury, extending not alone to injuries which are directly and immediately caused by the wrongful act, but also to such consequential injuries, as according to common experience of men are likely to result from such act.

4. Same—Intervening Acts.

A *tort-feasor* is not relieved from liability from his negligent act when damages for a personal injury results therefrom as the natural and probable consequence by the intervening act or omission of a third party, whether wrongful in itself or not, which is made necessary or proper because of the act of such *tort-feasor.*

5. Same—Physicians and Surgeons — Minimizing Damages — Ordinary Care.

Where a person is injured as the proximate cause of the negligent act of another, it is his duty where the injury reasonably appears to require it, to minimize his damages in the exercise of ordinary care or prudence under the circumstances, to secure the attendance of a physician or

surgeon, as the case may be, and when the party injured has used such care as required of him the *tort-feasor* is responsible for the results whether favorable to him or otherwise.

6. Carriers—Railroads—Depots—Lights—Negligence— Evidence — Nonsuit.

A railroad company is required to exercise a high degree of care in providing for its passengers a reasonably safe place to pass from its trains to its passenger depot, and at night to properly light such places for the safety of its passengers, and where there is conflicting evidence as to its failure or omission of duty in this respect, it is sufficient to be submitted to the jury upon the issue of its actionable negligence, and to deny its motion as of nonsuit upon the evidence in the case.

7. Damages—Verdict—Negligence—Appeal and Error.

Held, while the jury's award of damages in this case was large for the personal injury sued on caused by the defendant's negligence, the refusal of the trial judge to set it aside as excessive will not be disturbed on appeal.

STACY, C. J., dissenting.

APPEAL by defendant from *Sinclair, J.*, at April Term, 1926, of WAYNE. No error.

Action to recover damages for personal injuries. Plaintiff alleges that his injuries were caused by the negligence of defendant, in that defendant negligently failed to furnish him a safe place at which to alight from defendant's train, on which he had been riding as a passenger, and also a safe place along which to walk after he had alighted from said train, to defendant's station; defendant denies the allegations of negligence, and pleads in bar of plaintiff's recovery, his contributory negligence; defendant alleges that plaintiff had a weak knee at the time, and that with knowledge of this fact, plaintiff carelessly and negligently walked along side its moving train; that while thus walking, plaintiff, because of his weak knee, fell towards the moving train, with the result that he was injured.

The evidence for the plaintiff tended to show the facts to be as follows:

On the night of 17 August, 1924, plaintiff was a passenger from Pine Level to Selma, on defendant's west bound train, from Goldsboro to Greensboro, N. C. This train arrived at Selma at about 11 p.m.; when the train was stopped for the discharge of passengers at Selma, the car in which plaintiff was riding stood 40 to 50 yards east of the Union Station, which is located on the west side of the Atlantic Coast Line track, running north and south, at its intersection with defendant's track, running east and west. The station is immediately to the north of defendant's track. Plaintiff with other passengers for Selma, left the car and began to walk beside the train, on the north side of defend-

ant's track toward the Union Station. Plaintiff knew the physical conditions beside defendant's track from the place at which he left the car to the station; there was a ditch, as plaintiff well knew, just off the walkway, provided for passengers, extending toward the station. There were lights at the station, but none at the point where plaintiff was required to alight, and none on the walkway on which he was required to walk toward the station. It was dark, and plaintiff could not see the ditch, or the ground on which he was walking. He was the last passenger to leave the car. Soon thereafter the train began to move, and plaintiff, walking in the darkness, with knowledge that there was a ditch just off the walkway, stumbled and fell toward the moving train; his left hand struck the iron rail of defendant's track and was cut off by the wheels under the cars of the moving train.

Defendant offered evidence tending to show that plaintiff left the car in which he had been riding as a passenger at the usual place at which passengers for Selma alighted; that the walkway to the station was constructed of dirt and crushed stone, and was hard and level; that the lights from the station and from the cars were sufficient to enable plaintiff to see the ground upon which he was walking and the moving train; and that plaintiff had wrenched his knee some time prior thereto and that it was then weak, causing him to stumble and fall while walking toward the station.

The issues submitted to the jury were answered as follows:

1. Was the plaintiff, Otis Lane, injured by the negligence of defendant, Southern Railway Company, as alleged in the complaint? Answer: Yes.

2. Did the plaintiff, Otis Lane, by his own negligence contribute to his injury as alleged in the answer? Answer: No.

3. What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: $15,000.

From the judgment upon this verdict defendant appealed.

Dickinson & Freeman for plaintiff.
Langston, Allen & Taylor for defendant.

CONNOR, J. Plaintiff, testifying as a witness in his own behalf, exhibited to the jury his left hand. All of the hand, except the thumb and index finger, had been cut off. He had testified that this was the result of the injury which he had sustained when he stumbled and fell while walking, in the dark, on the unlighted walkway provided by defendant for passengers, beside its moving train toward the Union Station. His hand had struck against the track and had been crushed by the wheels under the train. Immediately after the injury, plaintiff

was taken to the local surgeon of defendant for treatment. This local surgeon took plaintiff to the hospital at Smithfield, N. C., where his wounded hand was treated. Two of his fingers had been cut off at the time of the injury; the little finger was cut off by the surgeon at the Smithfield Hospital. After remaining at the Smithfield Hospital for ten days, plaintiff, who was a soldier in the United States Army, went to the hospital at Fort Bragg, near Fayetteville, N. C., where his injured hand was again treated.

Plaintiff testified as follows: "Just as soon as I got there, they took the scissors and cut the dead skin off and grafted some skin from my side. They took the skin off my side twice, and it took 59 stitches to sew it up. The skin on my hand as grafted isn't as tough as the other. It is just as easy to skin as can be. When it is skinned, it does not heal up so easily; it takes a long time to heal up. Some skin was grafted also from my thigh at a different time from the grafting from my side. I suffered bad pain at the time of and after the injury, and on account of the injury. I also suffer now. Every time I work any it hurts. Every time I go to work now something in my eye draws it to one side. The pain comes in my right side once in a while, and hurts at the point where the grafted skin was taken off."

In apt time defendant objected to all the testimony relative to the grafting of skin from plaintiff's side and thigh, and to the pain caused thereby, and assigns as error the refusal of the court to sustain these objections. Defendant contends that such testimony should have been excluded, for that in no event can it be liable for damages resulting from the grafting of skin by a surgeon upon plaintiff's body, at least in the absence of evidence that this was a necessary or proper treatment of the injury to plaintiff's hand; that such damages were not caused by any act of defendant.

The broad general rule, with respect to compensatory damages, which are given as the pecuniary equivalent for the injury done, is that the wrongdoer is liable to the person injured for all the natural and direct or proximate consequences of his wrongful act or omission; subject to certain qualifications and exceptions, not applicable to the instant case, he is liable only for such consequences. This rule is applicable in cases both of contract and of tort. 17 C. J., 728. In the case of torts, the general rule is that the wrongdoer is liable for any injury which is the natural and probable consequence of his misconduct. Such liability extends not only to injuries which are directly and immediately caused by his act, but also to such consequential injuries, as according to the common experience of men, are likely to result from such act. 17 C. J., 750.

Where an intervening act of a third party, not connected with or related to, but independent of the act or omission of the wrongdoer, results in damages, distinct from the damages resulting from the first wrongful act or omission, the original wrongdoer cannot be held liable for such additional or increased damages; but where such intervening act, whether wrongful in itself or not, is made necessary or proper because of the act of the wrongdoer, he is liable for the additional or increased damages, resulting therefrom, upon the principle that such damages are the natural and probable consequences of his act. *Balcum v. Johnston,* 177 N. C., 213, and cases cited. It is uniformly held to be the duty of one who has suffered a personal injury by the negligence of another, to exercise due care to mitigate the damages by having his injury treated by a physician or surgeon, if the nature of the injury is such as reasonably to require medical treatment or a surgical operation. See *Brewington v. Loughran,* 183 N. C., 558, for statement by *Stacy, J.,* of the principle as applicable to damages recoverable for breach of covenant in a rental contract. *Johnson v. R. R.,* 184 N. C., 101, and cases cited. If the injured person exercises due care to have the injury properly treated, the result of the treatment, if not beneficial, cannot affect the damages, which he would otherwise be entitled to recover of the wrongdoer, by whose wrongful act he was injured. If the treatment of the injury, procured by the injured party, in the exercise of due care, is beneficial, and reduces the damages resulting from the act or omission of the wrongdoer, such reduction relieves the wrongdoer *pro tanto;* if such treatment is not beneficial, and results in increased or additional damages, the wrongdoer whose act or omission made the treatment necessary or proper must be held liable for such additional or increased damages.

An application of these principles to the facts presented by defendant's assignment of error, leads to the conclusion that they cannot be sustained.

In *Sears v. R. R.,* 169 N. C., 446, it is held that where there is some evidence that as the result of a personal injury, which was alleged to have been negligently inflicted by the defendant on its employee, two surgical operations were performed, and that the second one was made necessary by reason of the defendant's negligence and as a proximate result thereof, it is proper for the trial judge to refuse to instruct the jury that in no view of the case was the defendant liable for the additional suffering, etc., caused by the second operation.

It has further been held that where the injured person had received unskillful treatment by a physician or surgeon, increasing the damages, defendant may be liable for such consequences where the person injured has used reasonable care in selecting the physician or surgeon, 17 C. J.,

738, note 56 and cases cited. In the instant case, plaintiff was taken first to the local surgeon of defendant; then by him to a hospital, where he remained, under treatment, for ten days; he then went to the hospital maintained by the United States Government at Camp Bragg, for the care and treatment of soldiers in the service of the government. There was evidence sufficient at least for the jury to find that plaintiff had exercised due care in the selection of physicians and surgeons to treat his wounded hand, and that such treatment as he received was proper, if not necessary, to repair the injury to plaintiff's hand, alleged to have been caused by defendant's negligence, and to mitigate or reduce the damages resulting from such injury. If the damages resulting immediately from the wrongful act of defendant was reduced by grafting skin, taken from plaintiff's body, upon the wounded hand, it is but just that defendant should be held liable for damages resulting from the grafting.

In addition to other evidence, tending to show that treatment by skin-grafting was necessary or proper, Dr. T. M. Bizzell, admitted to be an expert physician, testified that in his opinion, treatment by grafting skin upon the injured hand was necessary, although grafted skin does not possess the vitality and resistance of natural skin.

On the day when this case was set for trial, and within a few hours before it was called, defendant moved for a continuance upon the ground that J. W. Barham, a material witness in its behalf, who had been duly served with a subpœna, was sick and unable for that reason to attend the trial. Plaintiff's counsel resisted the motion, and stated to the court that they would consent that the deposition of J. W. Barham be taken during the term of court, and that they would waive notice of the taking of the deposition. In consequence of this statement, the court declined to allow the motion for continuance, and directed that the deposition be taken. The deposition was thereafter taken by the court stenographer, at the home of J. W. Barham, in Selma, in the presence of counsel for both plaintiff and defendant. The formalities of signing, sealing and opening the deposition were duly waived. During the trial, defendant's counsel offered this deposition in evidence. There was no objection by counsel for plaintiff to the form of the deposition, but said counsel stated to the court that they would object to such portions of the deposition as contradicted the allegations of defendant's answer, upon which defendant relied in support of its plea of contributory negligence as a bar to plaintiff's recovery. The court stated that "it would exclude all portions of the deposition tending to prove contributory negligence and which were in contradiction of defendant's pleadings." Defendant excepted to this statement

of the court, and did not thereafter offer to read to the court or the jury any part of the deposition.

Assignment of error based upon this exception cannot be sustained. The deposition had been taken informally; it had not been returned to the court, as required by C. S., 1809; owing to the circumstances under which the deposition was taken, C. S., 1819, and C. S., 1820 cannot be held to apply to this deposition. Plaintiff had had no opportunity to object in writing to testimony contained in the deposition, and to have these objections passed upon by the judge, before trial. The provisions of these statutes must necessarily be held to have been waived by the consent of both parties that the deposition should be taken during the term of court at which the case was tried. Plaintiff's first opportunity to be heard upon objection to the competency of the testimony contained in the deposition was when the deposition was offered by defendant as evidence during the trial. His consent that the deposition might be taken without notice, and his waiver of all formalities, required by statute, cannot be held to be a waiver of his right to object to incompetent testimony appearing in the deposition, and to have such objections passed upon by the court at the trial.

The general statement of the court, before defendant had read, or offered to read the deposition or any part of it, is not such a ruling upon the competency of evidence at the trial as may be made the ground of an exception. In order that an exception may be made the basis for an assignment of error, on appeal, it must be duly taken to a specific and definite ruling by the court upon a matter of law relative to the subject-matter of the controversy between the parties. After the statement by the court, defendant did not read or offer to read the deposition. The court therefore did not rule upon any specific testimony contained in the deposition; no ruling of the court upon the admissibility or competency of testimony offered by defendant as evidence upon the trial is presented by the assignment of error. Plaintiff did not object generally to the deposition; he objected only to such portions as might tend to contradict defendant's allegations with respect to contributory negligence. *Phillips v. Land Co.*, 174 N. C., 542; *Smith v. McGregor*, 96 N. C., 111.

Other assignments of error, based upon exceptions by defendant to the admission of evidence, and to instructions of the court in its charge to the jury have been carefully considered; it is not deemed necessary to discuss these assignments of error; they cannot be sustained.

Defendant relies chiefly upon its assignment of error based upon its exceptions to the refusal of the court to allow its motion for judgment as of nonsuit, at the close of all the evidence. Plaintiff does not con-

tend that there was negligence with respect to the construction of the place at which he was required to alight from the train, when it was stopped at Selma, or with respect to the construction of the walkway provided for him and other passengers to pass from the train to the Union Station. There was evidence to sustain his contention that it was dark when the train arrived at Selma; that he was required to alight from the train at a place 40 or 50 yards from the Union Station; that there were no lights at said place, or on the walkway, the lights at the station ahead of him not being sufficient to enable him to walk, with reasonable safety, toward the station; that there was a ditch just off the walkway, extending toward the station, which he could not see, because of the darkness, but which he knew was there; that in order to avoid falling into this ditch, he was walking close to the train, which began to move soon after he alighted; that there was a large number of passengers walking toward the Union Station at the time; that he wished to get to the station in time to purchase a ticket from Selma to Fayetteville, for the Atlantic Coast Line train, which made connection at Selma with defendant's westbound train; and that all these facts rendered the place along which he was required to walk unsafe, and that this was the proximate cause of his injury. This evidence was sufficient to be submitted to the jury, upon the first issue; it cannot be held that plaintiff's evidence was consistent only with an affirmative answer to the second issue, involving the defense of contributory negligence. There was a conflict in the evidence, at least, as to the proximate cause of plaintiff's injury; this required the submission of the evidence to the jury.

The principle that a common carrier is held to a high degree of care in the performance of its duty to a passenger to provide for him, at its passenger stations, not only a safe place at which, but also safe conditions under which he may go upon and alight from its trains, and pass to and from the train to the station, has been frequently applied in decisions of this Court. *Leggett v. R. R.*, 168 N. C., 366; *Roberts v. R. R.*, 155 N. C., 79; *Smith v. R. R.*, 147 N. C., 448; *Wagner v. R. R.*, 147 N. C., 315, 19 L. R. A. (N. S.), 1028; *Mangum v. R. R.*, 145 N. C., 153; *Ruffin v. R. R.*, 142 N. C., 120; *Pineus v. R. R.*, 140 N. C., 450. The principle has been recognized and enforced by courts in other jurisdictions, and pursuant thereto it has been held that "stations, as well as platforms, walks, and other approaches should at night be reasonably lighted for a sufficient time before and after the arrival and departure of trains to enable passengers to alight from and board trains with reasonable safety." 10 C. J., 919, note 74, and cases cited. The failure to provide sufficient lights to enable a passenger, by the exercise

of reasonable care for his own safety, under conditions existing at the time, certainly when caused by or known to the carrier, to walk from the place at which he is required to alight from the train, on a dark night, along the walkway provided by the carrier, to the station, is a breach of this duty, and when the proximate cause of an injury to the passenger, is actionable negligence. Upon the application of this principle to the facts which the jury might find from the evidence in this case, the motion for judgment of nonsuit was properly refused by the court.

At the time of his injury plaintiff was 19 years of age; three months prior thereto he had enlisted in the United States Army at Camp Bragg; prior to his enlistment he had lived with his mother on her farm near Pine Level, N. C. He testified that he had not had much education; his occupation was farming. Before the injury he was a strong, healthy young man, able to do a full day's work; since the injury, he can do only a fourth of the work which a man ought to do. He was in the hospital at Smithfield for ten days and at Fort Bragg from 27 August, 1924, to 5 January, 1925. He suffered "bad pain" at the time of the injury to his hand, and continues to suffer pain on account of said injury; he has lost all the fingers of his left hand, except the index finger and the thumb; the wound was repaired by skin grafted from two places on his side, and from his thigh; the operation by which the skin was grafted was necessary or at least proper for the repair of his injured hand; it caused him pain and suffering; this grafted skin is very thin and does not have the vitality and resistance of natural skin; it is easily injured, and when bruised or scratched does not heal readily. It is manifest that, because of his injury, he is permanently "handicapped" in doing the work of a farmer, or any work requiring the use of his hand. His injury was caused by the negligence of defendant, and was not contributed to by negligence on his part. The jury, under instructions from the court, which are well supported by decisions of this Court, has assessed his damages at $15,000. This is admittedly a large sum; the trial judge, however, did not disturb the verdict on the ground that it was excessive. *Gilland v. Stone Co.*, 189 N. C., 783. On defendant's appeal we find no error in the trial upon matters of law or legal inference for which this Court may, in the exercise of its jurisdiction under the Constitution, grant a new trial. The judgment must be affirmed.

No error.

STACY, C. J., dissenting.

HARDY v. THORNTON.

(Filed 13 October, 1926.)

Reference—Findings—Appeal and Error.

The findings of fact by the trial judge upon the report of a referee supported by competent evidence, are not reviewable on appeal.

CIVIL ACTION tried before *Nunn, J.*, and a jury, at February Term, 1926, of GREENE.

Plaintiff, landlord, instituted a suit against the defendant, his tenant, to recover balance due on a running account for the years 1919, 1920, and 1921. A claim and delivery was instituted at the beginning of the suit, and the 1921 crop of defendant seized thereunder. The crop was afterwards sold. The defendant denied the indebtedness, and further, that plaintiff had any lien on the 1921 crop for the payment of advances for the preceding years. At the December Term, 1924, a compulsory reference was ordered and Hon. G. V. Cooper appointed referee by Judge G. E. Midyette. Thereafter, the referee, after hearing the evidence and argument of counsel, filed a report which embodied findings of fact and conclusions of law as required by statute. Both sides filed exceptions to the referee's report, and the cause came on for a regular hearing before Nunn, J., at the February Term, 1926, who heard the exceptions of the parties, and, after submitting certain issues to the jury, entered judgment that "the report of the referee, except as the same is modified by the aforesaid findings of the jury, and as further modified by this judgment, be, and the same is in all respects approved and confirmed."

The jury found in favor of the plaintiff, and from judgment on the verdict the defendant appealed.

John G. Anderson, Sutton & Greene for plaintiff.
Shaw, Jones & Jones for defendant.

PER CURIAM. The court ordered a compulsory reference under C. S., 573, because the controversy involved the "examination of a long account on either side." The exceptions to the compulsory reference were withdrawn. It is established law in this State that a finding of fact by a Superior Court judge on exceptions to a referee's report is not reviewable in the Supreme Court if there is evidence to support such finding by the trial judge. *Miller v. Groome*, 109 N. C., 148; *Thompson v. Smith*, 156 N. C., 345; *Dumas v. Morrison*, 175 N. C., 431; *Caldwell v. Robinson*, 179 N. C., 518.

In this case the findings of fact are all supported by evidence, and have been approved by the trial judge. Hence, such findings are not reviewable in this Court. *Dorsey v. Mining Co.*, 177 N. C., 60.

The record is voluminous and many exceptions were taken to the evidence and the charge of the court. Each of the exceptions has been examined and considered, but the Court is of the opinion that the case was properly tried and in accordance with well-settled principles of law.

No error.

DONOVAN GRIFFIN v. J. W. BAKER.

(Filed 13 October, 1926.)

1. Pleadings—Demurrer.

Demurrer to complaint in an action for abuse of process will not be upheld if any part of the pleadings liberally construed will sustain the action.

2. Process—Actions—Abuse of Process.

Abuse of process is the unlawful use of the process regularly issued, in proper form, from the court.

APPEAL by defendant from *Bond, J.*, at August Term, 1926, of FRANKLIN. Affirmed.

W. H. Yarborough and Ben T. Holden for plaintiff.
Thomas W. Ruffin for defendant.

PER CURIAM. Two causes of action are relied on by plaintiff: (1) Libel; (2) Abuse of the process of the court. The defendant demurred.

A demurrer to a pleading admits the facts stated therein for the purpose of passing upon the questions raised by demurrer. On demurrer a complaint will be sustained if its allegations constitute a cause of action or if facts sufficient for this purpose are logically inferable therefrom under a liberal construction of its terms.

1 R. C. L., p. 102, defines Abuse of Process: "Abuse of legal process consists in the malicious misuse or misapplication of that process to accomplish some purpose not warranted or commanded by the writ. In brief, it is the malicious perversion of a regularly issued process whereby a result not lawfully or properly attainable under it is secured."

"There is malicious abuse of process where a party under process legally and properly issued employs it wrongfully and unlawfully, and

not for the purpose it is intended by law to affect." *Stanford v. Grocery Co.*, 143 N. C., at p. 422; *Jackson v. Telegraph Co.*, 139 N. C., p. 347; *R. R. v. Hardware Co.*, 135 N. C., 73; *S. c.*, 138 N. C., 174; *S. c.*, 143 N. C., 54.

The rule is well established that where a general demurrer is filed to a petition as a whole, if any count of the pleading is good and states a cause of action, a demurrer should be overruled, and the same rule governs as to demurrers to defenses. 21 R. C. L., sec. 77.

The complaint states a cause of action for abuse of process. On the record it is unnecessary to discuss the question of libel.

For the reasons given the judgment is

Affirmed.

C. W. CAUSEY, W. C. BOREN AND J. CLARENCE WATKINS v. GUILFORD COUNTY, J. A. RANKIN ET AL., INDIVIDUALS COMPOSING THE BOARD OF COMMISSIONERS OF GUILFORD COUNTY; THE BOARD OF EDUCATION OF GUILFORD COUNTY AND FRED PEACOCK ET AL., INDIVIDUALS COMPOSING THE BOARD OF EDUCATION OF GUILFORD COUNTY.

(Filed 20 October, 1926.)

1. Schools—School Districts—Appeal and Error—Findings of Fact—Review.

Upon appeal from a restraining order the Supreme Court is not concluded by the facts found by the Superior Court judge in passing upon the question as to whether the county-wide plan of schools has been legally adopted as the statute requires, and its effect upon its repeal of a special school district theretofore existing under special statute relating to the schools of the county, and the Supreme Court may review the evidence and make its own conclusions of law therefrom. 3 C. S., 5481(1).

2. Schools—County Board of Education—Change in Plans — Notice—Statutes.

Our statute requiring the county board of education before changing the system of the schools from an existing one to notify by publication, etc., interested patrons, and in a prescribed way the committeemen of the district included in the contemplated change, is only for their meeting to be held in an advisory capacity not binding on the board, and when the statute has been complied with before the adoption of such plans, the action of the board is final without further notice, when the provisions of the statutes on the subject have been complied with. 3 C. S., 5481(2). Public Laws 1924, Ex. Ses., ch. 121.

3. Statutes—Repeal—Schools—School Districts.

Held, the school code under which a county board of education may change from an existing system of public schools to that therein provided (Public Laws of 1923, ch. 136, art. 6; 3 C. S., 5481), expressly repeals all former laws in such instances, including a provision in a special act providing that the school district therein created shall continue to be an independent school district and shall have exclusive control of its public free schools.

4. Schools—School Districts—Statutes—Surrender of Charter—New Districts.

Where in contemplation of making a change from a special charter district to one authorized under our general statute, the board of trustees of the existing district passes a resolution requesting the county board of education of the proposed district to assume full jurisdiction and directing the execution of a quitclaim deed conveying title to its school property, may operate as a surrender of its charter, and objection that the special district continues to exist and function is untenable. C. S., 5430.

5. Statutes—Interpretation—Schools—School Districts.

Statutes relating to a change of school districts within a county are to be liberally construed to effectuate the legislative intent.

6. Schools—School Districts—Indebtedness of Special District Included in New One—Statutes—Local Tax Districts.

Where a special school district with an existing indebtedness has been included in the creation of a larger district, the formation of the new district without provision therefor in effect retains the indebtedness only on the special district incorporated therein, and is valid under our general statutes on the subject, the old district for the purpose becoming a local tax district. School Code, secs. 157, 238; 3 C. S., 5555.

APPEAL by the defendants from an order of *Webb, J.,* enjoining them from issuing and selling certain bonds, from collecting certain taxes, and from exercising any dominion or control over certain schools, and directing the county board of education to reconvey certain property to the city of Greensboro, as will appear by reference to the judgment. From GUILFORD. Reversed.

The object of the action is to annul and declare void the purported creation of a new school district known as the "Greater Greensboro School District," and to enjoin the levy of taxes and the issuance of bonds for the benefit of the district. The motion to continue the temporary restraining order came on for hearing at the courthouse in Greensboro on 16 August, 1926, upon the pleadings, affidavits and record evidence, and the presiding judge found the following facts:

1. The territory comprising the corporate limits of the city of Greensboro previous to the act of the General Assembly of 1923, extending

such corporate limits constitutes a special charter school district of the public school system of Guilford County, North Carolina, as defined by the laws of the State of North Carolina.

2. On 8 April, 1926, the board of trustees of such special charter district passed a resolution requesting the board of education of Guilford County to assume jurisdiction of such special charter district and directing the chairman and secretary of such board to execute a quitclaim deed conveying the property belonging to such school district to said county board of education.

3. At the time of the passage of such resolution, said board of trustees did not hold the legal title to such property, the same being vested in the city of Greensboro. The county board of education, upon receiving such request, by resolution duly passed, deferred action thereon and ordered such request filed with the secretary of such county board of education, and directed such secretary of such county board of education to procure the deed referred to.

4. No request was made upon the duly constituted authorities of the city of Greensboro to execute a deed conveying to the county board of education such school property until some time after 25 May, 1926.

5. On 22 June, 1926, the members of the city council of Greensboro, by a vote of five to two, directed the execution of such deed after being advised that they held title to such property only as trustees, and, as to the disposition thereof, were subject to the direction of such board of trustees of said Greensboro special charter school district.

6. Said deed was not actually executed, either by the city of Greensboro or by the board of trustees of such special charter school district, until 25 June, 1926, and was not placed of record until 29 June, 1926.

7. The charter of the special charter school district (comprising the territory embraced in the corporate limits of the city of Greensboro previous to the extension thereof in 1923) has never been legally surrendered, and that such district was a special charter district on and after 25 May, 1926, and still constitutes a special charter district. Such special charter school district, by vote of the citizens resident thereof when the territory embraced therein constituted the corporate limits of the city of Greensboro, authorized the issuing of bonds of the par value of $1,000,000 for the purpose of purchasing sites, erecting buildings thereon and equipping the same for use as public schools. Such bonds were issued as obligations of the city of Greensboro as a municipal corporation and are still outstanding and constitute a lien upon the property situate in such special charter district, and both interest and principal thereof are only to be paid from taxes levied upon the property situate in said district.

8. Such special charter district owes a floating indebtedness of approximately the sum of $300,000.

9. On 8 April, 1926, the defendant, county board of education, attempted to create a school district in Guilford County designated as "Greater Greensboro School District," embracing within its bounds the territory embraced in said Greensboro special charter school district and the territory embraced in the white school district in Guilford County known as McAdoo Heights, McIver, Pomona Mills, Glendale, South Buffalo, and a part of a district known as Muir's Chapel District, and also the negro districts of Guilford County known as Jonesboro, McCarmel, Pomona, Terra Cotta and Jacksonville. Such alleged new district did not take in all of the new territory of the city of Greensboro as extended under the charter of the city of Greensboro as enacted by the General Assembly of 1923.

10. The county board of education alleges that it created said school district either by adopting or modifying a county-wide plan of organization of the schools of Guilford County, as provided for under chapter 136, Public Laws 1923, as amended.

11. The copy of the minutes of the county board of education attached as an exhibit to the complaint in this cause is a true and accurate copy of such parts of said minutes as they purport to be, and set out all that was ever done by said county board of education looking to the adoption of the county-wide plan of organization of the schools of Guilford County, except what is alleged to have been done by the county board of education on 19 May, 1923, and all that the minutes show in regard to what was done at that meeting in regard to the adoption of said county-wide plan is as follows:

"19 May, 1923. The board met at ten o'clock a. m. in joint session with the school committeemen of the county. All members of the county board present, except Dr. Peacock. At the joint meeting, the plans of the board of education with reference to school development in Guilford County were explained to the committeemen." Such copies of said minutes and exhibits attached to the complaint are made a part of these findings of fact as showing the actions therein referred to.

12. Said county board of education has never adopted the county-wide plan of organization for the schools of Guilford County in accordance with the provisions of the statutes passed in regard to such action.

13. There is set out in the copies of the minutes attached to the complaint in this cause all that the county board of education ever did with regard to the creation of the alleged greater Greensboro school district and in regard to petitioning for an election in such district to authorize the levying of a tax, in addition to all other taxes, of 30 cents on the $100 of property valuation for the maintenance of the schools in such

district and for the authorizing of the issuing and selling of bonds of the par value of $2,300,000 to purchase sites for, erect buildings on and equip such buildings for school purposes in such district, and to levy taxes to pay interest upon said bonds and to create a sinking fund for the retirement of such bonds at maturity.

14. There is set out in the copies of the minutes of the board of county commissioners of Guilford County attached as an exhibit to the complaint in this cause, all that such board ever did in regard to ordering held and auditing the returns of such election.

15. Said elections were ordered held 25 May, 1926, and previous to such time and at such time the property in the Greensboro special charter school district was subject to a maintenance tax of 50 cents on the $100 of property valuation, and in the official notice of said election, a copy of which is attached to the complaint in this cause, the voters in said district were notified that the voting of a maintenance tax of 50 cents at the election on 25 May, 1926, would repeal the authority to levy the maintenance tax of 50 cents theretofore authorized and levied in said special charter district.

16. There were more registered, qualified voters for said election of 25 May, 1926, resident of said Greensboro special charter district than all the other territory added to such special charter territory by the alleged creation of the greater Greensboro school district.

17. No notice was given the voters resident in said Greensboro special charter district that the school property of said district was to be conveyed, and that the same was not actually conveyed until more than thirty days after said election.

18. The county board of commissioners provided for said election twelve voting precincts, only three of which comprised territory exclusively outside said Greensboro special charter district, and in that territory there were 1,294 registered voters, of which only 379 voted in favor of the levying of the 30 cents maintenance tax, and 392 voted in favor of the issuing of the $2,300,000 bonds. There was no evidence that a majority of the voters in the territory outside said Greensboro special charter district voted either in favor of the levying of such maintenance tax or the issuing of such bonds.

19. The conveying of the property belonging to such Greensboro special charter district on 25 June, 1926 (said deed being recorded 29 June, 1926) was done only with the idea that the greater Greensboro school district had been legally constituted, and that the charter of said district had been legally surrendered, and that the county-wide plan had been legally adopted, and such school district having not been legally constituted and such charter not legally repealed, and such county-wide plan not legally adopted, the county board of education holds said prop-

erty as trustees for the city of Greensboro, and should be required to reconvey the same to such city.

20. There was no notice given the school trustees and committeemen of Guilford County of the meeting of the county board of education held 8 April, 1926, by mailing notice to such committeemen and trustees, serving notice upon such committeemen or trustees, or publishing a notice thereof in a newspaper published in Guilford County.

21. The elections of 25 May, 1926, were not held in a legally constituted district and are, therefore, void and of no effect.

Upon the foregoing facts judgment was rendered perpetually restraining the defendants from issuing all or any part of the bonds alleged to have been authorized by the election of 25 May, 1926 ($2,300,000), from collecting any tax by virtue of said election, and from exercising dominion or control over the public schools in the special charter district, and directing the county board of education to execute and deliver to the city of Greensboro a deed reconveying the property conveyed to the county board of education by the city and the board of education of the special charter district on 25 June, 1926.

The defendants excepted, assigning error, and appealed.

Brooks, Parker & Smith for plaintiffs.

John N. Wilson, A. Wayland Cooke, and Chester B. Masslich for defendants.

ADAMS, J. For several years prior to 15 March, 1923, the corporate limits of the city of Greensboro formed a square, the center of which was the center of the intersection of Elm and Market streets, the sides being each two miles in length, cutting at right angles imaginary lines drawn north, south, east, and west from the center, and enclosing an area of four square miles. This area, it is admitted, constituted a special charter district in the public school system of Guilford County. Private Laws 1911, ch. 2, sec. 19 *et seq.* In 1917, pursuant to C. S., 2903, the city adopted a new charter, in which it was provided that the city should continue to be an independent school district and as such should have exclusive control of the public free schools within the corporate limits as they were then prescribed and as they might subsequently be extended, and that the board of education should be charged with the duty of erecting buildings and maintaining an adequate system of schools within the district. The legal title to the school property was vested in the city. Some time in the same year (1917) in an election duly held there was authorized by the vote of a majority of the qualified voters of the city a maximum property tax of fifty cents on the one hundred dollars valuation of property, to be used for the mainte-

nance of the public schools within the district, and this tax has since been annually levied and collected. Also, there was authorized by a like vote an issuance of bonds in the sum of one million dollars, the proceeds of which were to be used in acquiring land and erecting suitable buildings and equipping them for school purposes. These bonds were issued and sold as the obligation of the city of Greensboro (*Duffy v. Greensboro,* 186 N. C., 470), and the city has annually levied a tax to pay the interest and to retire the serial bonds as they mature. The plaintiffs allege that the special charter district owes in addition a floating debt of about $300,000 and that no provision has been made for assuming or paying this indebtedness; but in reply the defendants aver that the General Assembly has provided that this obligation "shall be and remain" the indebtedness of this particular district. Private Laws 1923, ch. 37, secs. 31, 32, 91. This act, in like manner with the charter adopted in 1917, continued the old city limits as an independent school district under the name of the "Greensboro School District."

In 1921 the whole of Guilford County, save the special charter district and High Point Township, was made a special school taxing district (Public-Local Laws 1921, ch. 131; Public-Local Laws 1921, Ex. Ses., ch. 38); and in 1922 a majority of the qualified voters therein authorized the annual levy and collection of a tax not exceeding twenty-five cents on the one hundred dollars valuation of property situated within the territory. This tax also has been regularly collected.

At the session of 1923 the General Assembly enacted a series of statutes, effective on 15 April, 1923, amending and codifying the laws relating to public schools, therein prescribing a method for the adoption of a county-wide plan of organization. Public Laws 1923, ch. 136, Art. VI; 3 C. S., 5481. The defendants allege that on 19 May, 1923, the county board of education in the exercise of authority conferred upon it by this act adopted a county-wide system or plan of organization and retained the plan until modified on 10 April, 1926, as a means of providing an adequate school system for the benefit of all the children of the county; but this allegation is specifically denied by the plaintiffs.

In a meeting held on 2 February, 1926, the board of county commissioners, pursuant to a request of the county board of education and in compliance with 3 C. S., 5663, ordered that an election be held on 30 March, 1926, to ascertain whether the voters of the county favored the levy of a special county tax not to exceed thirty cents on the one hundred dollars valuation of property to supplement the six months school fund and, if authorized, to be levied in lieu of the tax of twenty-five cents imposed in the special taxing district created under the act of 1921. The election was held, the returns were canvassed, and it was

declared that a majority of the qualified voters of the county had voted in favor of the proposed tax.

The plaintiffs allege that on 8 April, 1926, the county board of education attempted to create a new school district, which was to function on and after 1 July, 1926, including the special charter district and the territory embraced in several other districts; that on the same day the trustees of the special charter district formally requested the county board of education to assume full jurisdiction therein and directed the execution and delivery to this board of a release or quitclaim to all the school property therein situated. It is alleged by the plaintiffs that the proposed new district was never legally established and that the special charter district remains as it was originally created. This the defendants deny.

On 15 April, 1926, the board of county commissioners, in agreement with a resolution passed by the board of education on 8 April, ordered a special election to be held in the alleged new district on 25 May, for the purpose of submitting to the qualified voters thereof the two questions of authorizing a maintenance tax of thirty cents on the hundred dollars valuation of property in addition to all other taxes and of issuing bonds for the district in the sum of $2,300,000, and levying a tax in addition to all other taxes, sufficient to pay the interest and to provide a sinking fund for the payment of the respective bonds at maturity. The election was held, and it was formally determined that a majority of the qualified voters favored the taxes and the bonds.

This synopsis in connection with the findings of fact forms a background against which the assignments of error may be viewed; and as these assignments involve, not only inferences of law, but findings of fact, we may recall the rule that in appeals of this character the court is not concluded by the facts as found by the trial judge, but is at liberty to review the evidence and to determine the facts for itself—a rule none the less available because in the judgment of the court the findings of fact and the conclusions of law are in some instances apparently intermingled. *Howard v. Board of Education,* 189 N. C., 675; *Cameron v. Highway Commission,* 188 N. C., 84; *Lee v. Waynesville,* 184 N. C., 565.

One of the points on which the briefs exhibit wide divergence of reasoning relates to the alleged adoption of the county-wide plan of organization. The defendants say that it is immaterial whether or not the county board of education legally adopted the plan on 19 May, 1923, and thereafter continued it in effect as set forth in the affidavit of T. R. Foust, for the reason that a new plan, which was essential to the creation of the greater Greensboro school district, was legally adopted on 8 April, 1926; while the plaintiffs insist that there is no recorded

adoption of the system and that it never became effective. This disagreement invites an examination of the evidence on the point.

In several of its meetings, held on and after 7 November, 1925, the county board of education considered a petition requesting an extension of the city school district. The question was again presented in a meeting held 29 December, 1925. At that time the board of education was working under a county-wide plan, legal or otherwise, and it was concluded that an extension of the city school district—the old Greensboro school district—could not be effected without making a change in the "existing" plan. 3 C. S., 5481(2). Accordingly, in this meeting the county superintendent of public instruction exhibited a map of Guilford County, "showing the present location of each school district, the position of each, the location of roads, streams, and their natural barriers, the number of children in each district, and the size and condition of each school building in each district." This was in strict compliance with the statute. 3 C. S., 5481(1). Thereupon a plan "was prepared, indicating proposed changes so as to work out a more advantageous school system for the entire county"; it was filed with the secretary and marked, "Tentative modification of county-wide plan, 29 December, 1925." Before adopting the proposed plan the county board of education was required to call a meeting of all the school committeemen and the boards of trustees and to lay the plan before them for their advice and suggestions (3 C. S., 5481, sec. 2)—notice to those affected to be given by one publication, at least ten days before the meeting or hearing, in a newspaper published at the county seat, giving the hour, day, and place of the meeting or hearing and the purpose thereof, and by mailing to or serving notice upon all committeemen and trustees. Public Laws 1924, Ex. Ses., ch. 121, sec. 2. The county board of education called a meeting of all the committeemen and all the trustees to be held at ten o'clock on 16 January, 1926, to consider a modification of the county-wide plan. Notice that the meeting had been called and that the tentative plans contemplated the creation of a new school district was published in a newspaper and sent by registered mail to every committeeman and trustee in the county, as the statute requires. In the meeting not only the extension of the city school district was considered, but the "whole educational program" of the county. Objection was made that the extension of the city school district would result in removing taxable property from the county taxing district to the city district; but the election held on 30 March, 1926, removed this objection. Until the election was held the county board of education deferred action involving any change in the boundaries of the school districts. It was a few days thereafter, 8 April, that the board "took up the consideration of the adoption of the county-wide plan discussed

at the meeting on 16 January, 1926, and at the joint meeting held on 16 January, 1926, with the school trustees, committeemen and school patrons of the county" and resolved "that the existing county-wide plan or organization of schools be and is hereby changed and modified," as set forth in the resolution. If at this time there did not "exist" a county-wide plan which had been legally adopted, the board since 19 May, 1923, had proceeded on the theory that the plan was in practical operation and the repeated references in the minutes to the "existing plan" should be considered in the light of this fact. Moreover, the new plan affected every school district in the county. R. 36, 37, 38.

Against the legality of this procedure the appellees urge the contention that the provision for giving notice is mandatory and that no notice was given of the meeting held on 8 April. Whether under *Spruill v. Davenport,* 178 N. C., 364, and other cases, the direction is mandatory we need not now adjudge, for we do not concur in the appellees' interpretation of the statute requiring notice to be given. The act of 1923 (3 C. S., 5481) requires the board of education before changing the adopted plan to notify interested patrons and the committeemen whose advice is sought, and the act of 1924 (Ex. Ses., ch. 121) points out the method by which the notice shall be given; but this notification is designed to provide a hearing for the committeemen, trustees, and interested patrons before the modification or adoption of the county-wide plan. This in our judgment is the reasonable construction of the statutes. There is no machinery for adopting the plan in a joint meeting and no requirement that there shall be notification of the meeting at which the plan is to be adopted by the board of education. The joint meeting is advisory; the plan can be adopted only by the board. We conclude therefore that his Honor was in error in finding as a fact (twelfth paragraph of the judgment) that the county-wide plan had never been adopted. *Harrington v. Comrs.,* 189 N. C., 572; *Blue v. Trustees,* 187 N. C., 431.

Since the boundary lines of a school district can be changed only as the statute provides (C. S., 5481(2), it is essential to determine whether the greater Greensboro school district was created in accordance with an adopted county-wide plan of organization.

The plaintiffs aver that the special charter district has never ceased to exist, and, indeed, that its charter could not legally be repealed under C. S., 5555 (School Law, sec. 157). Their argument on the latter proposition is based upon sections in the city's amended charter of 1917 and 1923 to the effect that the city is and shall continue to be an independent school district and shall have exclusive control of its public free schools. This position, they say, is fortified by the provision that

other school districts in the county may be changed in the manner provided by law. Their deduction is obvious: the special charter district is the creature of a local law which is inconsistent with and is neither modified nor repealed by the general law; the special charter district therefore is established and is not subject to change in like manner with other districts. They cite *Felmet v. Comrs.*, 186 N. C., 251, in which it is held that a local statute enacted for a particular municipality is intended to be exceptional, and is not repealed by the enactment of a subsequent general law. The opinion goes further: "Unless the repeal is provided for by express words or arises by necessary implication." Is not a definite repealing clause included in the School Code? This law went into effect on 15 April, 1923, and in "express words" repealed all laws in conflict with it, including those "passed by the General Assembly of 1923." Public Laws 1923, ch. 136, sec. 378. The repealing clause embraced the amendment of 1917 and that of 1923, which was effective from and after 15 March. Private Laws 1923, ch. 37, sec. 106. This clause points out the legislative purpose to repeal conflicting laws and to provide the means by which a special charter district, municipal or other, may surrender its charter rights and become a local tax district.

We advert now to the other proposition: that the special charter district has never ceased to exist. As we understand it, the plaintiffs' argument is this: Under section 157 (C. S., 5555) when the petition of the special charter district is accepted by the county board of education, the trustees of the special charter district must convey to the county board the title to all the school property; here the deed was not executed until 25 June, 1926, and was not recorded until 29 June; it is the registration of the deed which repeals the special charter; therefore the special charter was not repealed, if at all, until 29 June; if the charter was not repealed before that time the special charter district was not legally included in the greater Greensboro school district, and the attempted creation of this district was void. The situation, we grant, is not free from difficulty; but the argument, while not without force, in our judgment is not conclusive.

On 8 April, 1926, the board of education resolved: "That in accordance with the county-wide plan adopted 8 April, 1926, there be and hereby is created a new school district to be known as greater Greensboro school district, which shall begin to operate as such on 1 July, 1926," made up of the existing Greensboro school district and eleven other districts, together with a part of Muir's Chapel District. *Blue v. Trustees*, 187 N. C., 431. C. S., 5430, provides: "Whenever duties are assigned to the county board of education in this subchapter it shall not

be construed so as to take away from the board of trustees of any special charter district any duties or other powers assigned to said board of trustees by the General Assembly"; and the Court has said that special charter districts do not as a rule come within the compulsory regulations of the public school authorities unless and until they have surrendered their special charters according to the provisions of the school law. *Blue v. Trustees, supra; Sparkman v. Comrs.*, 187 N. C., 241. As indicated, the school law prescribes the method. 3 C. S., 5555; School Code, sec. 157.

Now, what was done? On the same day (8 April, 1926), the special charter district adopted a resolution requesting the county board of education to assume full jurisdiction of the Greensboro school district and directing the execution of a quitclaim deed conveying title to the school property. R. 39. Intending to form the new school district the board of education deferred final action, but requested its secretary meanwhile to secure the necessary conveyance of the property. It is alleged in the complaint and admitted that again on 22 June, 1926, the city council by a vote of five to two directed the conveyance to be made; but in making this order they were responding to legal advice that they held the title to the property only as trustees. In the resolution creating the greater Greensboro school district the board of education declared that it immediately came into being, but that it should "begin to operate as such on 1 July, 1926." It was deemed necessary to hold an election in the new district before the close of the fiscal year; to this end the new district must exist. The request that the county board of education should assume full jurisdiction of the special charter district manifested a purpose on the part of the board of trustees to surrender its charter rights. The trustees concluded that they no longer had control; that they were naked trustees; and that jurisdiction was then vested in the county board. The board of education, however, as suggested by the appellants, was in this dilemma: immediate acceptance would have been followed by immediate conveyance of the school property and immediate registration of the deed; the county board would then have been compelled to assume immediate control of the special charter district. This would have disarranged the schools in the special charter district and in other districts forming a part of the new district; it would have broken into the full term of the special charter district and would have left the new district without money for the remainder of the fiscal year; for the money raised by taxation in the special charter district could not have been used for the benefit of the new district. Apparently the only present escape from this predicament was in the course pursued

by the board of education: to make the necessary changes without trammeling some of the schools it proceeded on the principle that the special charter district, upon surrender of jurisdiction by the trustees, became an inchoate local tax district. However this may be, it brought into existence the new school district which should not "begin to operate as such" before the end of the fiscal year lest the hazard of deranged schools be incurred; it prescribed new boundary lines; it procured an election; it took other necessary steps. These measures, while not concurrent in time, were directed to a common end—the ultimate technical repeal of the special charter and the synchronous functioning of the new district. Every separate measure was a unit; the combined units were one transaction, the several components of a unified whole.

With respect to statutes construction is strict or liberal. Strict construction refuses to extend the import of words used in a statute so as to embrace cases or acts which the words do not clearly describe; liberal construction is that by which the letter of the statute is enlarged or restrained so as more effectually to accomplish the purpose intended. In this case we are convinced that the legislative intent calls for a liberal, comprehensive and rational construction of the statutes in question; and this construction leads to the conclusion that the special charter of the old city district did not function after the jurisdiction of the trustees was surrendered, and that the new district was lawfully created.

The plaintiffs refer to the defendants' allegation that the county board of education intended that the special charter district withdraw the surrender of its charter rights if the voters in the new district failed to vote the proposed tax and bonds. Whether the board of education could permit the trustees to withdraw the petition or whether it could be withdrawn without such permission is academic; the election was held and the tax and bonds were voted. With the mere motive of the county board in deferring action we are not concerned.

The validity of the election held on 25 May is questioned by the appellees on the ground that there was no separate vote in that part of the district which is outside the special charter district, and that it does not affirmatively appear that a majority of the voters in the outlying territory approved the proposition submitted. The cases of *Hill v. Lenoir County,* 176 N. C., 572, *Hicks v. Comrs.,* 183 N. C., 394, *Perry v. Comrs., ibid.,* 387, and *Barnes v. Comrs.,* 184 N. C., 327, were decided before the enactment of the school code. Public Laws 1923, ch. 136. We have held that the county-wide plan was duly adopted; these cases, then, are not pertinent. *Sparkman v. Comrs., supra, Coble v. Comrs.,* 184 N. C., 342, and *Plott v. Comrs.,* 187 N. C., 125, dealt with special taxing

districts. *Harrington v. Comrs., supra,* applied or extended the doctrine to school districts created under an adopted county-wide plan of organization and must now be regarded as controlling on this point.

We think it unnecessary to dwell on the exception to the seventeenth finding of fact. There is nothing in the judgment to indicate that this finding had any appreciable bearing upon any of the conclusions of law, or that the voters did not know that the conveyance would be made, or, if they did not know, the effect of their ignorance on the election. The statute was constructive notice and no other notice was required. 3 C. S., 5555.

It is finally urged on behalf of the plaintiffs that the judgment should be upheld because in the creation of the new district no provision was made for the indebtedness of the special charter district or the special taxing district. It is not clear that the judge considered this question, though it is a subject of discussion in the briefs.

We have referred to the provision that all obligations of the special charter district shall be and remain the indebtedness of the district. In the notice of the election held on 25 May, 1926, was the following: "The voting of the maintenance tax will repeal the maintenance tax heretofore voted and levied for the old Greensboro school district, but not any tax required by law for payment of outstanding indebtedness nor will it affect the county-wide maintenance tax of not exceeding thirty cents voted 30 March, 1926."

The territory in the old city district is still liable for the floating indebtedness of the district ($300,000) and for the bond issue of a million dollars, the obligation of the city. See School Code, sec. 5. With the repeal of the special charter the old city district became a local tax district (School Code, 157) subject to sec. 228, which prohibits its abolition while it is in debt. The statutes formulating the county-wide plan have no provisions for existing debts; but section 238 of the School Code, dealing with special taxing districts, confers upon the county board of education authority to assume all the indebtedness, bonded or otherwise, of a local tax or special charter district. The county board was not obliged to assume such indebtedness and did not do so; we must therefore conclude that the property originally affected remains liable. *Plott v. Comrs.,* 187 N. C., 125; *Coble v. Comrs., supra.*

After giving to the entire record, the briefs, and the oral argument our careful and deliberate consideration, we are of opinion that all the exceptions taken by the appellants should be sustained and that the judgment of the Superior Court should be and it is hereby

Reversed.

E. V. DAWSON, FIRST NATIONAL BANK, OF DUNN, AND N. A. TOWNSEND, TRUSTEE, v. CONCORDIA FIRE INSURANCE COMPANY, OF MILWAUKEE, WISCONSIN, AND NATIONAL BEN FRANKLIN FIRE INSURANCE COMPANY, OF PITTSBURGH, PENNSYLVANIA.

(Filed 20 October, 1926.)

1. **Insurance, Fire—Policies — Contracts — Payment of Premium — Delivery—Intent.**

Where a policy of fire insurance is in the hands of the company's soliciting agent, before the insured has paid the premium thereon necessary for the policy to be enforced in case of loss by the insurer, as expressed upon its face, and a loss has been incurred which is covered by the policy, under conflicting evidence, the question as to whether the policy has been delivered to the soliciting agent of the company is largely one of intention of the insured, and the agent of the insurer who had agreed between themselves that the payment of the premium should be deferred.

2. **Same—Evidence.**

Whether or not a fire insurance company has delivered its policy covering the loss in suit to its agent with the intent that it should be delivered to the insured contrary to an express condition appearing in the face of the policy that its validity depended upon the payment of the premium by the insured, may be shown by the words or acts of the insured indicating that the policy, in the hands of the agent at the time of the loss, was not beyond its legal control, and if the insured, the plaintiff in the action, establishes this fact to the contrary, he may recover damages for a loss occurring within the life of the policy.

3. **Same—Delivery of Policy Upon Condition of Payment of Premium.**

A policy of fire insurance, issued in the statutory form, may by agreement between the insurer or its authorized agent and the insured be delivered upon the mutual intent, that it shall be valid only upon the subsequent payment of the premium at a fixed future date, and under such circumstances the policy will have no binding effect until this condition has been fulfilled.

4. **Same—Principal and Agent—Agreement of Agent Extending Time To Pay Premium.**

Where the agent of a fire insurance company has personally agreed with the insured that the latter may pay the premium thereon within a certain fixed time, and the company itself is not a party thereto, and has not become bound thereby, and a loss has occurred within the life of the policy contract, the insurer, the principal, is not liable for the loss in suit.

5. **Same—Cancellation of Policy by Insurer—Notice—Policy—Contracts.**

Where a fire insurance company has issued a policy, through its agent, upon condition that it may cancel its policy upon given previous notice to the insured, such notice has no application to a separate and independent agreement between the agent and the insured as to the pay-

ment of the premium, contrary to the terms of the policy, or requires the insurer to give such previous notice before canceling the policies at the agent's request.

6. **Same—Notice of Cancellation Given by Insurer's Agent Under an Independent Contract.**

The stipulation in the standard fire insurance policy, giving the insurer the right of cancellation upon notice, is for the protection of the insurer, and requires a strict compliance with its terms as to the notice given, but is not applicable when the notice is given by its agent, acting in behalf of the insured, under an independent agreement with the insured as to the payment of the premium contrary to the express stipulation of the policy, and by which agreement the company has never become bound.

7. **Insurance, Fire—Policies — Contracts — Principal and Agent — Cancellation.**

Where the agent of the insurer enters into an independent contract with the insured to carry the premium for a certain period of time, and the insured has failed to pay accordingly, there is an implied authority given by the insured to the agent, to cancel the policy with insurer, under the provision in that respect of the standard or statutory form.

8. **Insurance, Fire—Policies—Loss Payable Clause—Damages—Insurer's Liability.**

Where the insured has lost his right to recover for a loss by fire under his contract with the insurer, for failure to pay the premium, no right can be acquired by one claiming under the "loss payable clause" of the policy contract.

9. **Contracts—Parol Evidence—Written Contracts.**

Where the defense to an action to recover upon a policy of fire insurance is that the policy was not delivered to the insured for nonpayment of premium, it goes to the question as to whether the contract had been made, and admits of parol evidence contradictory or at variance with the written contract in suit.

ADAMS, J., dissenting.

APPEAL by plaintiff from *Sinclair, J.*, of HARNETT. No error.

On 13 April, 1923, defendant insurance companies issued two policies of insurance, in the standard form prescribed by statute, insuring plaintiff, E. V. Dawson, for one year, against loss of the property described therein, by fire; each policy was for $2,500; contemporaneously with the issuance of said policies, it was expressly agreed by said plaintiff, and the agent of defendants, that credit should be extended by said agent for the payment of the premiums therefor, and that if said premiums were not paid within the time agreed upon, which was prior to 30 April, 1923, said agent might cancel said policies; the policies were not delivered to plaintiff, but were retained by the agent for plaintiff, the insured; the premiums were not paid within the time agreed upon, and on 30 April, 1923, the agent wrote on each policy

the word "Can," an abbreviation for the word "canceled," and sent the policies to the general agent of said companies, at Raleigh, N. C.; on 2 June, 1923, the property described in said policies was destroyed by fire; the value of the property, at the date of its destruction, was $8,000. This action was begun on 22 October, 1923, to recover the amounts alleged to be due under said policies.

Each of said policies contained a clause in the following words: "Any loss that may be ascertained and proven to be due the assured under the building items of this policy shall be held payable to First National Bank, Dunn, N. C., subject, nevertheless, to all terms and conditions of this policy." At the time of the issuance of said policies, plaintiff, E. V. Dawson, was indebted to said bank.

Upon the verdict of the jury, finding the facts as above stated, judgment was rendered that plaintiffs take nothing by this action, and that defendants go without day. From this judgment plaintiffs appealed to the Supreme Court.

E. C. West and Clifford & Townsend for plaintiffs.
F. S. Spruill and Young & Young for defendants.

CONNOR, J. The policies of insurance, upon which this action was begun, issued on 13 April, 1923, and insuring plaintiff, E. V. Dawson, for one year, against the loss of the property described therein, by fire, were in force on 2 June, 1923, the date of the destruction of said property (1) unless said policies were delivered upon condition that they should not become effective until the premiums were paid, or (2) unless the policies were canceled on 30 April, 1923, as contended by defendants. Plaintiffs contend that the policies were delivered without condition as to payment of premiums, and that the attempted cancellation by the agent on 30 April, 1923, was not valid, and therefore did not release defendants from their obligations, under the policies, because no notice, as required in the policies, was given to him by defendants, of an intention to cancel the policies, or that the same had been canceled.

Whether a policy of insurance has been delivered or not is largely a question of intention. If it was the intention of defendant companies, acting by their authorized agents, that the policies, executed by them, should be completed instruments; if this intention was evidenced by words or acts of defendants, indicating that the policies were put beyond their legal control; and if plaintiff acquiesced in this intention, and accepted the policies, they were delivered, so as to become effective from the date of issue, notwithstanding they did not pass beyond the physical control of the agents of the defendant companies; Vance on

Insurance, p. 169; *Hardy v. Insurance Co.*, 154 N. C., 430; *Mfg. Co. v. Assurance Co.*, 161 N. C., 88, 26 C. J., 58, sec. 51. Retention by the agent of the company of the policy, which, as between the insurer and the insured, has been delivered as a completed instrument, does not affect its validity.

A policy of insurance, in form as required by statute, may be delivered upon condition that it shall not become effective until the happening of some subsequent event. "In such cases, the policy is of no binding effect until the condition is fulfilled. Such conditions may be shown by parol, without violating the well-known rule prohibiting the varying of written agreements by parol testimony. The condition so shown goes to the existence of the policy, and not to its terms." Vance on Insurance, p. 170. In *Hartford Fire Insurance Co. v. Wilson*, 187 U. S., 467, 47 L. Ed., 261, it is held that a policy of fire insurance may be delivered to the agent of the insured upon condition, and that if the condition is not fulfilled, prior to the destruction of the property by fire, no recovery can be had, because the policy had not become effective prior to the loss. 18 Roses' Notes, p. 1187. See 26 C. J., p. 59, note 95.

The jury in the instant case has found that the policies were issued as alleged in the complaint; there is no finding or admission in the pleadings or otherwise that they were issued or delivered, conditionally as between the insurer and the insured. The policies became effective for all purposes on the day of their issue. The agreement as found by the jury was not between the insured and the insurer with respect to the terms of the policy but between the insured and the agent of the insurer with respect to the payment of the premiums to the said agent, and not to the company. Unless canceled in accordance with its terms, each of the policies continued in full force and effect from date of issue until 2 June, 1923, the day on which the property was destroyed by fire. There was an unconditional delivery of the policies, and they were in full force and effect, according to all the terms thereof from the date of their issuance.

It is expressly stipulated in each policy, as required by statute (1) that "this policy will be canceled at any time at the request of the insured," and (2) that "the policy may be canceled at any time by the company by giving to the insured five days' written notice of cancellation." No notice of intention to cancel, or of cancellation was given to the insured by the company. Clearly, therefore, if the attempted cancellation of the policies, on 30 April, 1923, was upon the initiative of the companies, or of their agent, acting for them, it was void. It did not release the companies from their obligations under the policies; they were in force, notwithstanding such attempted cancellation, on 2

June, 1923. No contract, valid in its inception, and unobjectionable in its terms, can be canceled, without the consent of all parties, who have acquired rights thereunder. *Trust Co. v. Ins. Co.,* 173 N. C., 558. The insured, when he accepted the policy, consented that the company might thereafter cancel the policy, upon giving him notice, in writing, of five days. This provision is manifestly for the protection of the insured. The right of the company to cancel the policy exists only because of the consent of the insured, given at the time of his acceptance of the policy and thereafter to be acted upon by the company only upon strict compliance by it with the terms upon which such consent was given. "A consent to a cancellation on a specified condition does not terminate the insurance unless such condition is performed." 26 C. J., p. 147, note 38. No written notice of five days having been given to plaintiff, by defendants, as required by the terms of the policies, defendants had no right to cancel the policies on 30 April, 1923; if the cancellation on said date was made by the companies, and not at the request of plaintiff, it is void, and did not terminate the insurance. Vance on Insurance, p. 495; *Mfg. Co. v. Assurance Co.,* 161 N. C., 88.

It is stipulated in the policy, however, that it will be canceled at any time by the company, at the request of the insured. This request may be made by the insured, in person, or by his authorized agent. Manifestly, the request for cancellation must be made after the policy has been issued, and while it is in force. It does not follow, however, that the agent who makes the request in behalf of the insured, must have been authorized so to do, after the policy has been issued, and while it was in force; such authority may be given prior to, or contemporaneously with the issuance of the policy. It may also be given upon condition, to be exercised in the discretion of the agent, upon the happening of the condition.

In the instant case, the terms of the contract of insurance between the insured and the insurer are contained in the written policy, as required by statute. The agreement as found by the jury, with respect to cancellation upon the failure of plaintiff to pay the premiums on the policies, was not a part of the contract of insurance between plaintiff and defendants. Only plaintiff, and the agent, acting in his own behalf, and not for his principal, were parties to this agreement. The agent did not undertake to act for, or to bind his principal, by the agreement. Failure of plaintiff to pay the premiums, within the time agreed upon, was not intended to result in a forfeiture of the policy. The agreement had no effect whatever upon the rights and obligations of plaintiff and defendant, under the policy. It was for the protection of the agent, who, upon the issuance of the policies, became liable to

defendants for the amount due for premiums. These premiums were payable in money; it was the duty of the agent to collect the premiums; upon the issuance of the policies, he became liable at once to the companies for the amount of the premiums. In extending credit to plaintiff, he was acting for himself, and not for the company. In consideration of the extension of credit, plaintiff agreed that upon his failure to pay the amount due as premiums, within the time agreed upon, the agent, acting for him, might cancel the policies, and thus relieve himself of liability to the company, or at least reduce the amount for which he was liable on account of premiums on these policies. The effect of the agreement was to authorize the agent, in behalf of plaintiff, to have the policies canceled by the companies, by making the request as provided in the policies. The agent having made the request, upon the failure of plaintiff to pay the amounts due him for premiums on the policies within the time agreed upon, the policies were thereby canceled on 30 April, 1923. After said date they ceased to have any validity as contracts of insurance. There is no error in the judgment that E. V. Dawson take nothing by this action.

The authorization by plaintiff of the agent of the companies to cancel the policies, as his agent, upon plaintiff's failure to pay the amounts due as premiums, within the time agreed upon, and the cancellation by said agent of the policies, under such authority, was not inconsistent with the duties which said agent owed to the companies. He had fully performed such duties when the policies were issued. The companies had consented that they should be canceled at any time upon the request of plaintiff. No terms or conditions were imposed upon plaintiff, and upon his request, made by the agent, defendants had no discretion, with respect to the cancellation. See *Warren v. Franklin Fire Ins. Co.*, 161 Iowa, 440. L. R. A., 1918 E., 477.

There being no error in the judgment that the insured cannot recover in this action, it must follow that there is no error in adjudging that his coplaintiffs cannot recover. No sum having been ascertained and proven to be due to the assured under the policies, none can be recovered by them under the "Loss Payable" clause in the policies. *Roper v. Ins. Co.*, 161 N. C., 151; *Gilman v. Commonwealth Ins. Co.*, 112 Me., 528, L. R. A., 1915 C, 759 note. The New York Standard mortgage clause is not in the policies.

The judgment is affirmed. There is

No error.

ADAMS, J., dissenting.

STATE v. JAMES JEFFREYS.

(Filed 20 October, 1926.)

1. Rape—Assault—Evidence—Identity.

Where in an action for rape the defense is an alibi, and the prosecutrix has positively identified the prisoner as her assailant, and her testimony was corroborated by the other State's witnesses, evidence that the defendant was identified as the assaulter the next morning after he was arrested, was not erroneously admitted.

2. Same—Declarations.

In an action for rape, testimony that the prosecuting witness said, soon after the assault "she could hardly sit up," is competent to show the assault had been committed, when the identity of the defendant has been shown.

3. Evidence—Nonsuit—Criminal Law.

Where the assault and the identity of the prisoner have been directly testified to, defendant's motion as of nonsuit upon the evidence is properly denied, upon his defense of an alibi.

4. Evidence—Corroboration—Criminal Law.

Held, in this action for rape, the admission of certain testimony tending to impeach the defendant's testimony, was not erroneous.

5. Evidence—Character—Substantive Evidence.

The evidence of the good character of a witness who has testified for the defendant in an action for rape, cannot be considered as substantive evidence to sustain an alibi he has set up as a defense.

6. Appeal and Error—Objections and Exceptions—Broadside Exceptions.

An exception that does not particularize as to the error complained of in the admission of evidence, is objectionable as a broadside exception.

INDICTMENT for rape, tried before *Barnhill, Judge Presiding,* and a jury, at May Term, 1926, of WAKE.

The evidence for the State tended to show that on Saturday morning, 19 December, 1925, between eight and nine o'clock, Mrs. Sarah Griffin, a white woman, about fifty years of age, was assaulted near the city rock quarry in Raleigh.

Mrs. Griffin testified that she had seen the said defendant on Friday morning when he had passed by her on the road, and she also testified that she had never seen the man before. She further testified that the defendant "had an old light overcoat on and a cap and was a yellow man; that the same man sits there. I know he is the man. I don't believe anything about it. If I were to live as old again as I am I would know him." She also testified: "He had that overcoat on, light yellow-looking coat like the one he has on." There was also evidence

tending to show that she described her assailant as a "tall, yellow negro" with scar and freckles, did not know which, and had a "mean-looking eye."

The defendant was arrested by police officers in April, 1926, and, while in custody, Mrs. Griffin was asked to come to the jail and see whether or not the defendant was the person who assaulted her. She identified the prisoner.

The defendant denied the assault or that he had ever seen the prosecuting witness; and further asserted that, on 19 December, he was working for Mr. W. H. Harris; that he reached the home of Mr. Harris about seven o'clock and was there on his premises cutting wood until four o'clock in the afternoon. Both Mr. Harris and his wife corroborated the defendant, and Mrs. Harris testified: "Do not think they left there because the axes were running all the time. . . . They first called for the axes between seven and seven-thirty." . . . The home of Mr. Harris was about a mile from the Rock Quarry road where the assault took place.

In regard to the overcoat which the defendant had on, Mr. I. M. Bailey testified that it was his overcoat and was in his possession until about 1 January, 1926, when he gave the coat to a negro named Spencer Thomas. Thomas testified that he got the coat from Mr. Bailey about the second week in January and loaned it to the defendant, Jim Jeffreys, the day before he was arrested.

Messrs. W. B. Hunter, E. B. Crow, Carey K. Durfey and J. T. Mallard testified as to the good character of Mr. and Mrs. Harris.

V. E. Lane, witness for the defendant, testified that on Saturday before Christmas he saw Jim Jeffreys and John Jeffreys, together with their mother, pass the railroad shop between six and seven o'clock, and that he asked them to cut wood for him, but that the mother said they were cutting wood for Mr. Harris.

There was also testimony as to the good character of the State's witness, Mrs. Griffin.

The jury rendered a verdict of guilty, and thereupon judgment was entered sentencing the defendant to death as provided by law, from which judgment the defendant appealed.

F. T. Bennett for defendant.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

BROGDEN, J. There are seven exceptions appearing in the record. The first exception is to the following question and answer: "How

soon after he was arrested?" (when State's witness identified defendant) A. "Next morning."

This exception is without merit, because the identity of defendant was one of the main questions in the case, and the fact that the officer testified that the State's witness identified the defendant soon after he was arrested was corroborative of the evidence of the State's witness, Mrs. Griffin, who testified that she did identify the defendant at the jail the next morning after he was arrested.

The second exception was to the following question and answer in reference to the physical condition of prosecutrix immediately after the assault: "Did she complain?" A. "Yes; she said she could hardly sit up."

This evidence was competent to prove that an assault had actually been committed. Certainly, if the State's witness had not been assaulted, there was no crime, and the proof of a crime was an essential part of the State's case.

Therefore, the bodily condition of Mrs. Griffin was competent. "Whenever the bodily or mental feelings or condition of an individual are material to be proved, the usual expression of such feelings are admissible as original evidence." *S. v. Hargrave,* 97 N. C., 457; *Sherrill v. Tel. Co.,* 117 N. C., 353; Lockhart's Hand Book of Evidence, sec. 209; *Howard v. Wright,* 173 N. C., 339.

The third and fifth exceptions are taken because of the refusal of the trial judge to nonsuit the case. These exceptions cannot be sustained. The defendant was positively identified by the prosecutrix, who also testified that he was the man who had assaulted her. It was, therefore, necessary to submit the case to the jury.

The fourth exception is to the following question asked the defendant on cross-examination: "Why didn't you ask that man out at Mordecai what he wanted you for and what did they arrest you on Hillsboro street one time for?" This exception cannot be sustained. The question was for the purpose of impeaching the witness and was therefore competent. *S. v. Lawhorn,* 88 N. C., 634; *S. v. Holder,* 153 N. C., 606; *S. v. Winder,* 183 N. C., 776.

The sixth exception is to the refusal of the trial judge to give the following instruction: "That evidence of the good character of a witness for defendant, introduced to establish an alibi, shall be not only considered as affecting the credibility of such witness, but as substantive evidence of the truth of the alibi relied upon by the defendant." The court properly declined to give this instruction. In no aspect of the law could evidence as to the good character of a witness tend to prove that a defendant or some other person was not at a particular place at a particular time. The purpose of character evidence is to enable

the jury to place the proper estimate upon the testimony of a witness. *S. v. Cloninger,* 149 N. C., 567; *S. v. Morse,* 171 N. C., 777.

The seventh exception is as follows: "That it was the duty of the court to charge the jury that, defendant having relied upon an alibi, the burden was upon the State to show conclusively and decisively that the defendant was the person that committed the offense, and that he was present at the time and place when said offense was committed. And the court erred in charging the jury that upon the evidence in the case the jury would be justified in finding that some other than defendant committed the offense. There was no admission on part of defendant or his counsel that would give weight to this charge by his Honor." This is a broadside exception to the charge of the court without specifying any particular error.

We have examined the charge of the court with great care, and this examination discloses that the charge presented every phase of defendant's defense, fully and impartially, and is free from legal error.

The alibi of the defendant was strong and supported by witnesses of good character, and, upon the evidence offered in his behalf, if believed, he was not guilty. But the weight of the evidence is for the jury and not for the court. The jury, upon competent evidence, has convicted the defendant of a capital offense, and the judgment as a matter of law must be upheld.

No error.

STATE v. CHARLES F. EDWARDS.

(Filed 20 October, 1926.)

1. Habeas Corpus—Certiorari—Appeal and Error.

An appeal will not lie in proceedings in *habeas corpus,* except in cases concerning the care and custody of children, and the procedure is by petition for a writ of *certiorari.*

2. Criminal Law—Judgment Suspended — Good Behavior — Conditions Broken.

The trial judge may suspend judgment upon conviction of the defendant of a criminal offense, upon condition of good behavior, etc., and subsequently impose and effectuate the sentence upon finding that the defendant had broken the condition.

3. Appeal and Error—Waiver—Certiorari—Habeas Corpus.

Where the court below of record has erroneously denied the right of appeal to the convicted defendant in a criminal action, he waives this right by failing to apply for a writ of *certiorari,* and by instituting proceedings in *habeas corpus.*

4. Habeas Corpus—Certiorari—Judgments—Courts—Void Judgments.

The appellate court in *habeas corpus* proceedings may not act as one of error and review on appeal, and the question on review on defendant's behalf, is whether the judgment in question was void because unlawfully entered.

5. Habeas Corpus—Certiorari—Supreme Court—Record.

Upon the application for a writ of *certiorari* to review a judgment entered in proceedings for *habeas corpus*, the case will be decided upon the records, and the Supreme Court will not consider any extraneous matters or circumstances.

6. Same—Judgments.

Matters set forth in the writ for a *habeas corpus* as having occurred on a trial, will not be considered on appeal to the Supreme Court when contrary to a statement of fact set out in the judgment reviewed or case settled.

PETITION for *certiorari*, in lieu of appeal, to review judgment of *Calvert, J.*, rendered 20 May, 1926, at Wilson, N. C., on return to writ of *habeas corpus*, refusing to discharge the defendant from custody.

A. O. Dickens, O. P. Dickinson and M. S. Strickland for petitioner.
Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

STACY, C. J. The defendant's petition made to this Court for a *certiorari*, contains allegations which, if supported by the record, it was thought, might have brought the case under the principle announced in *S. v. Hilton*, 151 N. C., 687. For this reason, and as no appeal lies from a judgment in a *habeas corpus* proceeding, except in cases concerning the care and custody of children, the writ was allowed. *In re McCade*, 183 N. C., 242; *In re Croom*, 175 N. C., 455.

The record sent up in response to the *certiorari* shows the following facts:

1. At the September Term, 1925, general county court of Wilson County, Charles F. Edwards was charged, in No. 412 as it appears on the minute docket of said court with a violation of the prohibition law. He entered a plea of guilty, and it was "adjudged by the court that he be imprisoned in jail twelve months and assigned to work on the public roads of Wilson County. Judgment suspended on payment of costs."

2. At the May Term, 1926, the following entry was made in the same case, No. 412, as it appears on the minute docket of said general county court of Wilson County: "Whereas, at this term, upon trial duly had before a jury empaneled, and the jury having found the

defendant guilty of illegal possession of liquor for purpose of sale and resisting an officer, it is now found by the court that the defendant has not complied with conditions of the suspended sentence pronounced in said case, from which no appeal was taken, that it now be revoked and it is adjudged by the court that the defendant be imprisoned in jail twelve months and he is assigned to work on the public roads of Wilson County."

3. The defendant appealed to the Superior Court from the judgments entered in the two cases tried at the May Term, 1926, general county court of Wilson County, and also asked that he be allowed to appeal from the order and judgment entered at that term in No. 412. The judge ruled that he could not appeal in the last named case and refused to allow the same. He was accordingly committed to the custody of the sheriff, and began the service of his sentence.

4. The defendant then applied to his Honor, T. H. Calvert, Judge Presiding at the May Term, 1926, Wilson Superior Court, for a writ of *habeas corpus* to have the lawfulness of his detention and imprisonment inquired into and determined. The judgment entered in the *habeas corpus* proceeding finds that "the imprisonment and restraint of the petitioner, Charles F. Edwards, is valid and lawful," hence the petition was denied. The correctness of this judgment is the question now under review.

The practice of suspending judgments upon convictions in criminal cases, on terms that are reasonable and just, has so long prevailed in our courts of general jurisdiction that it may now be considered as settled and a part of the permissible procedure in such cases. *S. v. Shepherd,* 187 N. C., 609; *S. v. Phillips,* 185 N. C., 620; *S. v. Vickers,* 184 N. C., 677; *S. v. Strange,* 183 N. C., 775; *S. v. Hardin,* 183 N. C., 815; *S. v. Hoggard,* 180 N. C., 678; *S. v. Greer,* 173 N. C., 759; *S. v. Everett,* 164 N. C., 399; *S. v. Hilton,* 151 N. C., 687.

The question here presented was decided in *S. v. Crook,* 115 N. C., 760, where it was held that a sentence might be imposed, for breach of condition, on a judgment previously suspended on payment of costs. Speaking to the question again in *S. v. Griffis,* 117 N. C., 709, *Avery, J.,* said: "We have had occasion in *S. v. Crook,* 115 N. C., 763, to comment upon the fact that the practice adopted in the courts of this State of suspending judgment upon the payment of cost is a peculiar one, for which we have searched in vain for precedents elsewhere. Indeed, it has proved difficult to find adjudications in other courts furnishing any analogies which would aid us in reaching a conclusion as to the force and effect of such order. It appears, however, that a practice somewhat similar had prevailed for many years in the courts of Massachusetts before it received the legislative sanction by enactment into a statute.

Commonwealth v. Dondican, 115 Mass., 136. But that Court and those of Florida and Mississippi (*Gibson v. State,* 68 Miss., 241; *Ex parte Williams,* 25 Fla., 310), where the Massachusetts idea seems to have been transplanted, though they may differ as to the manner or details of the proceeding, concur in holding that the sentence of the court, whether upon a finding or a confession of guilt, can be suspended only with the consent of the defendant. But as the postponement of punishment, with the possibility that it may never be inflicted, is deemed a favor to him, it is presumed by the court that he assents to such an order when made in his presence and without objection on his part. *S. v. Crook, supra,* at p. 766; *Gibson v. State, supra.* Where, under the practice prevailing in Massachusetts, the order was made that the judgment lie on file, it was entered with the consent of both the defendant and the commonwealth's attorney, and left either at liberty to have the case reinstated on the docket and to demand that the court proceed to judgment."

It is true, the judge of the county court, in the instant case, erred in denying the defendant the right to appeal to the Superior Court, but this was an error which the Superior Court could have corrected on the defendant's application for a *certiorari* to have the judgment brought up for review. *S. v. Greer,* 173 N. C., 759. Instead of asking for a *certiorari,* as might have been done, the defendant applied to the judge of the Superior Court for a writ of *habeas corpus.*

It is well settled that, in *habeas corpus* proceedings, the court is not permitted to act as one of errors and appeals, but the right to afford relief, on such hearings, arises only when the petitioner is held unlawfully, or on a sentence manifestly entered by the court without power to impose it. The judgment must be void as distinguished from erroneous. *Duffer v. Brunson,* 188 N. C., 789. Speaking to the question in *United States v. Pridgen,* 153 U. S., 48, the Court said: "Under a writ of *habeas corpus,* the inquiry is addressed not to errors, but to the question whether the proceedings and judgment rendered therein are, for any reasons, nullities, and unless it is affirmatively shown that the judgment or sentence, under which the prisoner is confined, is void, he is not entitled to his discharge." Again, in *People v. Liscomb,* 60 N. Y., 559, *Allen, J.,* delivering the principal opinion, said: "If there was no legal power to render the judgment or decree, or issue the process, there was no competent court and consequently no judgment or process. All is *coram non judice* and void. . . . In other words, upon the writ of *habeas corpus,* the court could not go behind the judgment, but upon the whole record, the question was whether the judgment was warranted by law and within the jurisdiction of the court."

On application for writ of *habeas corpus,* the question of the power of the court to render the judgment, under which the prisoner is held, is to be determined solely from the record and the judgment itself. Evidence of matters outside the record is not permitted to impeach the judgment. "The hearing is confined to the record and judgment, and relief may be afforded only when on the record itself the judgment is one clearly and manifestly beyond the power of the court, a statement of the doctrine supported in numerous and authoritative decisions here and elsewhere"—*Hoke, J.,* in *In re Holley,* 154 N. C., 163.

It is alleged in the defendant's petition to this Court for a *certiorari* that the costs had been paid in No. 412, as above referred to, and that the case was off the docket when the judgment was entered at the May Term, 1926, in the general county court of Wilson County, but these allegations are not supported by the record. On the other hand, it was found by the court and embodied in the judgment entered at the May Term, "that the defendant has not complied with the conditions of the suspended sentence pronounced in said case."

No error appearing on the record, the judgment must be upheld.

Affirmed.

J. H. DREHER v. M. W. DIVINE.

(Filed 20 October, 1926.)

1. Automobiles—Negligence—Passing Upon Highways—Signals—Warnings.

The driver of an auto-truck along a public highway is not held to the same degree of care in observing those who may wish to pass him coming from the rear, as in front, and is not required to turn to the right for such purpose, unless he is apprised by the one who wishes to pass, by proper signal, of his intention to do so. C. S., 2617.

2. Same—Reasonably Safe Conditions.

The driver of an automobile upon the signal of a faster car approaching from the rear, must turn to the right so that the other may pass to his left, when the conditions existing there at the time are reasonably safe to permit the other to pass.

3. Same.

The driver of an automobile who wishes to pass from the rear another ahead of him, must keep his automobile under control, so as to avoid a collision if the driver ahead of him apparently does not hear his signals or is not aware of his intention to pass, or the condition of the road makes it unsafe not only to himself, but to those who are driving from the opposite direction.

DREHER *v.* DIVINE.

APPEAL by plaintiff from *Midyette, J.*, at May Term, 1926, of NEW HANOVER.

Civil action to recover for damage to plaintiff's automobile, alleged to have been caused by the negligence of the driver of defendant's truck, in failing properly to yield the road on signal from plaintiff's agent.

The usual issues of negligence, contributory negligence and damages were submitted to the jury; and, from a verdict on the first issue in favor of defendant, the plaintiff appeals, assigning errors.

Herbert McClammy for plaintiff.
Wright & Stevens for defendant.

STACY, C. J. On 19 May, 1923, defendant's truck, loaded with furniture and operated by an employee, was moving along the public highway from Wilmington to Wrightsville Sound, when plaintiff's automobile, operated by a Mr. Marsh, was wrecked as it ran into the ditch alongside the road when the driver undertook to pass the truck on the left, approaching it from the rear. The automobile did not strike the truck, nor the truck the automobile. It is alleged that by reason of the failure of the driver of the truck properly to yield the road, the driver of the automobile was forced to run into the ditch in order to avoid striking the truck.

The driver of the defendant's truck testified that he could not see a car or vehicle approaching from the rear because of the heavy load of furniture, and that he was prevented from hearing, and did not hear, the signal given by the operator of plaintiff's car, if, indeed, it were given, because of the noise made by the truck.

It is the position of the plaintiff that the operator of the defendant's truck was guilty of negligent driving, on his own testimony, under the following clause in C. S., 2617: "Any person so operating a motor vehicle shall, on overtaking any such horse, draft animal, or other vehicle, pass on the left side thereof, and the rider or driver of such horse, draft animal, or other vehicle, shall, as soon as practicable, turn to the right so as to allow free passage on the left."

Plaintiff says it was the absolute duty of the driver of the truck, under this provision of the statute, to know that plaintiff's car was approaching from the rear, and that, if he did not hear the signal, it was his duty to hear it, or to keep a lookout for approaching vehicles from the rear, and to turn to the right so as to allow plaintiff's car free passage on the left, failing in which, he should be held liable for all damage, or injury, proximately flowing therefrom. We are unable to assent to this interpretation of the statute. We cannot think the Legislature intended to require the driver of a vehicle, Janus-like, to keep the same constant lookout backward as in the range of vision

looking forward. *Delfs v. Dunshee,* 143 Iowa, 381; *Watkins v. Byrnes,* 230 Pac. (Kan.), 1048; *Strever v. Woodard,* 141 N. W. (Iowa), 931, 46 L. R. A. (N. S.), 644.

It is true a slower vehicle has no right to obstruct a faster one desiring to pass, if the situation be such as to permit the rear one to pass in safety. And when the driver of a faster conveyance desires to pass a slower one, it is the duty of the driver of the one in advance, upon notice of the approach of the rear one and that it desires to pass, to turn to the right so as to allow free passage on the left, "as soon as practicable," according to the reasonable appearance of the situation. *Morrison v. Clark,* 196 Ala., 670. But the driver of the forward vehicle cannot be expected to turn to the right until he is apprised of the approach of the rear one and that its driver desires to pass. *Dunkelbeck v. Meyer,* 140 Minn., 283. The statute, we think, requires one to turn to the right when another overtakes him on the highway and indicates a desire to pass, but only after notice of such desire. *Mark v. Fritsch,* 195 N. Y., 282; *Pens v. Kreitzer,* 98 Kans., 759.

Moreover, the driver of a forward vehicle cannot be required to yield the road unless and until the conditions are such as to render a passage reasonably safe. And if the forward driver be not allowed sufficient time to turn to the right before the rear vehicle runs upon him, or is forced off the road in order to avoid striking him, he cannot be held liable for negligence, contributory or otherwise. One who operates an automobile should have it under control and if the driver of a front car has no knowledge of an approaching vehicle from the rear, and apparently does not hear its approach, the driver of the rear or trailing vehicle should reduce his speed and stop, if necessary, to avoid a collision or an injury. He cannot proceed regardless of the fact that the driver of the front vehicle does not turn to the right of the road, unless there be ample room to pass in safety without it.

"If there be not sufficient room it is said to be 'the duty of the foremost traveler to afford it, on request made, by yielding an equal share of the road, if that be adequate and practicable; if not, the object must be deferred till the parties arrive at ground more favorable to its accomplishment.'" 2 Elliott, Roads and Streets, sec. 1084. But the failure of the leading traveler to turn to the right so as to allow free passage on the left will not justify the other in purposely running into him or attempting to pass at all hazards. *Avegno v. Hart,* 25 La. Ann., 235, 13 Am. Rep., 133. The forward driver, however, may, under certain conditions, render himself liable for obstructing the highway *(S. v. Malpass,* 189 N. C., 349), but this is not our case.

Furthermore, a traveler who passes the left of the center of the highway is liable to violate the law of the road as to a third vehicle

approaching from the opposite direction, and hence he should attempt to pass a forward vehicle only when he can do so with safety to the travelers he is meeting as well as to the vehicle he is passing. *Pratt v. Burns,* 177 N. Y. Supp., 817. He must exercise reasonable care in making the passage so that injury may not result to other travelers on the road. *Bishard v. Engelbeck,* 180 Iowa, 1132, 164 N. W., 203.

Speaking to a similar situation in *Government Street Lbr. Co. v. Ollinger,* 94 So. (Ala. App.), 177, *Samford, J.,* clearly states the law as follows: "When two automobiles are being driven along a public road in the same direction, the relative duties the one owes to the other are to be governed somewhat by the circumstances of the particular case. The driver of the front car owes no duty to the rear or trailing car except to use the road in the usual way, in keeping with the laws of the road, and until he has been made aware of it, by signal or otherwise, he has a right to assume, either that there is no other automobile in close proximity to his rear, or that, being there, it is under such control as not to interfere with his free use of the road in front of and to the side of him in any lawful manner. In the absence of facts or circumstances that would put him on notice of the near approach of another automobile from his rear, the driver may drive slow or fast, select the parts of the road best suited to travel, stop or start at will, or turn into side roads, without the giving of signals of such intentions. Of course the rule would be different on the streets of a city, where the passage of automobiles along the streets is constant and frequent, requiring of all drivers of motor vehicles a high degree of care and watchfulness, this of itself being sufficient notice of the near approach of other cars, and under the same circumstances, known to the driver, the same rule as applied to city streets would apply to county highways; but to be applicable, the facts must be specially pleaded, which is not done in this case."

The judge's charge in the instant case was in keeping with the law as we understand it, hence the verdict and judgment will be upheld.

No error.

RALEIGH STORAGE COMPANY v. J. W. BUNN ET AL.

(Filed 20 October, 1926.)

Deeds and Conveyances—Railroads—Easements.

A railroad company may convey a good fee-simple title to lands conveyed to it by its predecessor, admittedly the owner, that were included in the operation of the railroad system, and as such in the operation of the railroad property.

STORAGE CO. *v.* BUNN.

APPEAL by defendants from *Barnhill, J.*, at May Term, 1926, of WAKE.

Controversy without action, submitted on an agreed statement of facts. Plaintiff, being under contract to convey a certain tract of land to the defendants, properly executed and tendered deed therefor and demanded payment of the purchase price as agreed. The defendants declined to accept the deed, claiming that the title offered was defective.

Upon the facts agreed, the court, being of opinion that the deed tendered would convey a good title to the property, gave judgment for the plaintiff; whereupon the defendants excepted and appealed.

Matt H. Allen, John N. Duncan, Oliver Allen and Murray Allen for plaintiff.

Banks Arendell for defendants.

STACY, C. J. On the hearing, the title offered was properly made to depend on whether a deed given by the Raleigh, Charlotte & Southern Railway Company to the Norfolk Southern Railroad Company, 25 July, 1912, for all its lines of railroad, rights of way, etc., ratified by Act of Assembly, 1913, was sufficient to convey the land in question situate, as it was, immediately adjacent to the railroad tracks of the Raleigh, Charlotte & Southern Railway Company in the city of Raleigh, with a warehouse and sidetracks located thereon and used at the time by said company for railroad purposes, under the following description in said deed, which comes after the particular description of lines of railroad and various properties situate in a number of counties of the State, to wit: "Also all lands, terminals, yards, . . . sidetracks, . . . warehouses . . . and all other property, real and personal, rights and things of every kind and description which appertain to any or all of the above described lines of road."

It is conceded by both sides, plaintiff and defendants, that if the *locus in quo*—admittedly owned by the Raleigh, Charlotte & Southern Railway at the time—passed under this conveyance, the judgment in favor of the plaintiff is correct and ought to be affirmed; otherwise not.

The Norfolk Southern Railroad Company took immediate possession of all the property owned by the Raleigh, Charlotte & Southern Railway Company at the time of the execution of the deed above mentioned, including the *locus in quo,* and the same was used continuously as an appurtenant to said line of railroad until the conveyance of the *locus in quo* to E. C. Duncan in 1919.

The intention to convey the property in question by the deed now under consideration is quite clear—indeed frankly conceded by the defendants—and we think the language used is sufficient for the purpose. *Mo. Pac. Ry. Co. v. Moffitt,* 94 Mo., 59; *Wise v. Wheeler,* 28 N. C., 196.

Affirmed.

SWIFT & COMPANY ET AL. v. ALBIN AYDLETT.

(Filed 20 October, 1926.)

1. **Bills and Notes—Negotiable Instruments — Actions and Defenses—Consideration—Fertilizers—Statutes.**

   A total absence of consideration received by the maker of a negotiable note is a matter of defense by the maker in an action brought thereon by the original payee of the note, and not against a holder thereof in due course purchasing without knowledge of the defect in the instrument. C. S., 3008, 3033.

2. **Same—Vendor and Purchaser—Implied Warranty.**

   In proper instances the user of fertilizers may show in defense of an action by the original payee of a promissory note given to the vendor manufacturer in payment thereof, that the fertilizers delivered to and used by him were useless or not beneficial for the purpose for which they were bought, and which were in contemplation of both of the parties at the time of the transaction, in the absence of opportunity for inspection; or when not observable until some time after the planting of the crop.

3. **Same—Express Provisions as to No Warranty of Use.**

   A user of fertilizers may avail himself of a defense upon an implied warranty in an action brought by a manufacturer thereof on a note given by him for the purchase price, that the fertilizers furnished were worthless as such and for the purposes intended, though there is an express provision in the note sued on that it was without "warranty as to results from use or otherwise."

4. **Same—Caveat Emptor.**

   The doctrine of *caveat emptor* does not apply to the purchaser and user of fertilizers in defense to an action by the latter to recover the purchase price, as against an implied warranty that the goods so bought were at least merchantable and were not absolutely worthless.

5. **Same—Tags—Ingredients—Statutes.**

   Manufacturers and vendors of commercial fertilizers impliedly warrant that they contain the ingredients specified on the tags placed on the bags, according to the requirements of the statute. C. S., 4690.

6. **Same—Burden of Proof—Consideration—Contracts.**

   The burden of proof is upon the manufacturer to show, in his action against the purchaser for the purchase price, that the goods were at

least merchantable, and that the ingredients used in their manufacture were in accordance with the specifications upon the tags placed on the bags under the requirements of our statute, C. S., 4690, and the purchaser may defend the action by his evidence to the contrary as a failure of consideration.

7. **Contracts—Warranty—Failure of Consideration.**

While the vendor and purchaser of a commodity may agree upon the rule or measure of damages in relation to the latter's recovery upon the former's breach of warranty, express or implied, it will not apply where the goods sold are entirely valueless, and the consideration for the contract has completely failed.

8. **Constitutional Law—Contracts—Vendor and Purchaser—Fertilizers.**

The provisions of C. S., 4697 as to the requirements of the manufacturer of commercial fertilizer, are constitutional and valid.

9. **Fertilizers—Statutes—Actions—Defenses.**

Where the provisions of C. S., 4697, as to the State analysis of commercial fertilizers, etc., have not been complied with, the purchaser is not prevented from setting up his defense that the commodity sold was unfit for fertilizing his crop, for which purpose it had been sold and bought.

10. **Fertilizers—Vendor and Purchaser—Breach of Implied Warranty—Damages—Evidence.**

Where a user of fertilizer has been buying that of a certain analysis for years past, and found it productive of potatoes on his land, he may show by parol evidence, in the manufacturer's action to recover on a note given for the purchase price, that at the time in question he had used the same kind of fertilizer he had theretofore bought from the same manufacturer on the same land under practically the same weather conditions of cultivation, and the potatoes so grown were too small and stringy to be of any value, and such evidence is not excluded by C. S., 4697.

11. **Fertilizer—Vendor and Purchaser—Contracts—Evidence—Effect on Crop.**

The rule excluding evidence of the inferiority of fertilizers bought from the manufacturer and used in making the crop, unless the latter had had it analyzed by the State chemist, does not apply to evidence tending to show in this way that the fertilizer was valueless and not that which the manufacturer had contracted to sell. C. S., 4697.

12. **Issues—Pleadings—Evidence—Verdict—Motion to Strike Out Answer—Appeal and Error.**

In an action by a manufacturer to recover upon a note given for the purchase price of fertilizers, the plaintiff must plead and show that the fertilizer furnished was in accordance with the contract of sale, and where this has not been done, it is error for the court to submit issues to the jury upon these questions and refuse to strike out answers to these issues upon defendant's motion.

STACY, C. J., concurring in part.

APPEAL by both plaintiffs and defendant from judgment of *Grady, J.*, at January Term, 1926, of PASQUOTANK. No error in plaintiffs' appeal. Error in defendant's appeal. Remanded for judgment in accordance with opinion.

Civil action on note for $220.50, payable to order of plaintiffs, Swift & Company, dated 13 May, 1922, and due on or before 1 September, 1922. Said note was executed by defendant for value received in fertilizers and contains the following clause:

"The consideration of this note is commercial fertilizers sold to the undersigned without any warranty as to results from its use or otherwise. Said fertilizers have been inspected, tagged and branded under and in accordance with the laws of this State."

Defendant, in his answer, admits the execution of the note sued on, and in defense of plaintiffs' action thereon, pleads total failure of consideration: first, in that the fertilizers delivered by plaintiffs were absolutely worthless, and of no value or benefit to the crop, under which they were used by him; and, second, in that said fertilizers did not contain the proper ingredients to produce good potatoes and to produce them for the early market, as represented by plaintiffs.

Defendant offered evidence tending to show that the commercial fertilizers which he bought of plaintiffs in 1922 were the kind which he had bought of plaintiffs, and used under his potato crop, during previous years. It was Swift's 8-3-3, and when used during said years on the same land as that on which defendant planted potatoes in 1922, produced good potatoes for the early market; that defendant planted and cultivated his potato crop in 1922 in the same manner, and by the same methods that he had used in the previous years; that the weather conditions and growing season for his crop in 1922 were good; that he sowed the fertilizers delivered to him by plaintiffs in 1922 in the same quantity per acre, and by the same method that he had sowed the previous years, when he made good crops; that in 1922, his potatoes never got fit to dig; that he dug them and put them on the market, but got nothing for them because they were strings; that the land, without any fertilizers, would have produced such potatoes as he made in 1922; that defendant is a farmer, and has been raising sweet potatoes in Currituck County, where the land upon which he made his crop in 1922 is situate, for twenty years; that plaintiffs knew that he bought the fertilizers—Swift's 8-3-3—for sweet potatoes; that it is the kind of fertilizers adapted to sweet potatoes, and always used by defendant for that crop.

There was evidence that defendant planted his potato sprouts in 1922, about 1 May; that the fertilizers which plaintiffs delivered to him were sowed when the sprouts were planted; that potato sprouts, when

the seasons are good, usually start off well, and do not show any effect of fertilizers sowed under them until two or three weeks after they are planted; that if no fertilizers are used, they then begin to turn yellow, and do not thrive; that if commercial fertilizers are used, when the sprouts are set out, at the end of two or three weeks, they begin to grow, and soon thrive; that about the last of May or the first of June, 1922, when the effect of fertilizers, such as defendant had bought of plaintiffs, would ordinarily have first been observed, defendant's plants began to fail; that from then until the potatoes were dug about the first of August, defendant's crop did not show any effect from the fertilizers used under the plants; that from the time the sprouts were set out until defendant signed the note, the plants were growing satisfactorily; that sweet potato sprouts will grow, for the first week or two after they are planted, better without fertilizers than they will with fertilizers.

Plaintiff in apt time objected to all testimony offered as evidence as to the results of the use of Swift's 8-3-3, under crops grown on defendant's land during years previous to 1922, and to all testimony as to the result of the fertilizers delivered to defendant of the crop of 1922; upon their appeal they assign as error the admission of this testimony as evidence upon the first issue.

No chemical analysis of the fertilizers delivered by plaintiff to defendant was offered as evidence by defendant; it is admitted in the pleadings that no chemical analysis of said fertilizers, showing a deficiency of ingredients, was made under the provisions of C. S., 4697, at the instance of either plaintiffs or defendant.

The issues submitted to the jury, with answers thereto, are as follows:

1. Did the plaintiffs fail to deliver to defendant commercial fertilizers of the analysis guaranteed on the bags, in accordance with their contract? Answer: Yes.

2. If so, what was the value of the fertilizers that were delivered to defendant? Answer: 33⅓ per cent ($73.50).

3. In what amount, if anything, is the defendant indebted to plaintiff? Answer: $73.50.

Defendant excepted to the submission of the second and third issues, and upon appeal, assigns same as error.

From judgment upon the verdict, that plaintiffs recover of defendant the sum of $73.50, with interest and costs, both plaintiffs and defendant appealed to the Supreme Court.

Ehringhaus & Hall and R. C. Lawrence for plaintiffs.
Aydlett & Simpson for defendant.

CONNOR, J. The note sued upon in this action is identical in form with the note upon which plaintiffs sought to recover of defendant in *Swift v. Etheridge,* 190 N. C., 162. The defense in that action was the same as that pleaded in this action. The defense in each action is absence or failure of consideration for the note executed by defendant and payable to the order of plaintiff.

With respect to negotiable instruments, it is provided by statute, in this State, that "absence or failure of consideration is matter of defense as against any person not a holder in due course, and partial failure of consideration is a defense *pro tanto,* whether the failure is an ascertained and liquidated amount or otherwise." C. S., 3008; Uniform Neg. Inst. Act, sec. 28.

This defense is available to the defendant in an action to recover upon a note, in form a negotiable instrument, the consideration for which, as recited therein, is commercial fertilizers sold by plaintiff to defendant. The fact that the consideration as appears in the face of the note is commercial fertilizers sold to the maker, cannot be held to deprive defendant, the vendee, of matters of defense, which by statute, are available in an action upon a negotiable instrument. It was held by this Court in the opinion written by *Clark, C. J.,* in *Jewelry Co. v. Stanfield,* 183 N. C., 10, that if goods delivered by the vendor to the vendee were worthless and unmerchantable, the provisions in the contract of sale that vendee might return any of the goods, and receive from the vendor other articles of the same grade, was no warranty at all except in form; that there was a total failure of consideration for the contract to pay the purchase price of the goods sold, and such failure was a good defense in an action by the vendor to recover of the vendee the purchase price of the goods. It was further held that the goods having been sold without opportunity for inspection, there was an implied warranty that they should at least be merchantable, citing in support of the decision *Main v. Field,* 144 N. C., 310; *Medicine Co. v. Davenport,* 163 N. C., 294; *Ashford v. Shrader,* 167 N. C., 45.

It is immaterial that defendant, vendee, gave to plaintiff, vendor, a note, in form negotiable, for the purchase price of the goods sold; the defense of failure of consideration is available to defendant, maker of the note, as against any person not a holder in due course. Plaintiff, Swift & Company, is the payee, and not holder in due course. C. S., 3033.

The doctrine of implied warranty in the sale of personal property is too well established in this jurisdiction now to be drawn in question. It should be extended rather than restricted. *Poovey v. Sugar Co.,* 191 N. C., 722; *Swift v. Etheridge, supra.* The harshness of the

common-law rule of *caveat emptor,* when strictly applied, makes it inconsistent with the principles upon which modern trade and commerce are conducted; the doctrine of implied warranty is more in accord with the principle that "honesty is the best policy," and that both vendor and vendee, by fair exchange of values, profit by a sale. In *Grocery Co. v. Vernoy,* 167 N. C., 427, the late *Justice Brown* says: "It is well settled by repeated decisions that on a sale of goods by name, there is a condition implied that they shall be merchantable and saleable under that name; and it is of no consequence whether the seller is the manufacturer or not, or whether the defect is hidden or might possibly be discoverable by inspection."

In *Furniture Co. v. Mfg. Co.,* 169 N. C., 41, in the opinion of *Allen, J.,* it is held that although there is no implied warranty as to quality in the sale of personal property, the seller is held to the duty of furnishing property in compliance with the contract of sale—that is, at least merchantable or saleable; and to this it is said, may be added that it shall be capable of being used if intended for use. *Ashford v. Shrader,* 167 N. C., 48 (implied warranty in the sale of oranges to be sold by the vendee, that oranges delivered are merchantable); *Grocery Co. v. Vernoy,* 167 N. C., 427 (implied warranty in sale of "Red-Marrow Beans" for food, that the beans delivered are edible, when cooked); *Medicine Co. v. Davenport,* 163 N. C., 297 (implied warranty in sale of medicines by manufacturer to dealer that the medicines delivered are at least merchantable); *Tomlinson v. Morgan,* 166 N. C., 557 (implied warranty in the sale of commercial fertilizers by a merchant to a farmer, that fertilizer delivered was suitable for crop); *Furniture Co. v. Mfg. Co., supra* (implied warranty in sale of a hearse to an undertaker, that the hearse delivered is capable of being used as a hearse); *Register Co. v. Bradshaw,* 174 N. C., 414 (implied warranty in sale of cash register by manufacturer to merchant for use in his business, that the register delivered is fit for use as a cash register). In a sale of an article of personal property by name which in itself represents that it is merchantable, or saleable or fit for a specific use, the law implies a warranty that the representations are true, although there is no express warranty to that effect. A vendor of an article of personal property, by name and description, cannot relieve himself of the obligation arising from the warranty implied by law to deliver an article which is at least merchantable, or saleable or fit for the use for which articles of that name and description are ordinarily sold and bought.

In *American Tank Co. v. Revert Oil Co.,* 108 Kan., 690, 196 Pac., 1111, 1112, cited in Williston on Sales, Vol. 1, p. 457 (2 ed.) in support

of the statement in the text, that "it should also be noticed that fitness for a particular purpose may be merely the equivalent of merchantability," it is said:

"A sale of a brand of manufactured article includes a contract that the article shall possess the qualities implied by the brand. 'Gold Drop Flour,' being a brand of flour, must make bread. *Kaull v. Blocker,* 107 Kan., 578, 193 Pac., 182; *Bunch v. Weil,* 72 Ark., 343, 80 S. W., 582, 65 L. R. A., 80 ('Capital Brand Flour, Extra Fancy'). A tank is, by definition, a receptacle for liquid. An order given for an oil tank makes known to the builder the purpose for which it is required—a storage of that kind of liquid—and a 1,600 barrel oil tank must be able to withstand the pressure of the designated quantity of oil under ordinary conditions of use. Implied warranty cases to this effect are numerous. Those which follow are illustrative. A whiskey barrel must not permit loss of whiskey by leakage, *Poland v. Miller,* 95 Ind., 387, 48 Am. Rep., 730; a fertilizer must give to land additional capacity to produce crops, *Wilcox, Gibbs & Co. v. Hall,* 53 Ga., 635; a potato digger must dig potatoes, *Hallock v. Cutler,* 71 Ill. App., 471; a mine pump must be able to pump water out of a mine, *Getty v. Rountree,* 2 Pin. (Wis.), 379, 54 Am. Rep., 138; a self-feeder must feed a threshing machine, *Parsons Co. v. Mallinger,* 122 Iowa, 703, 98 N. W., 580; a piano must be so constructed that it may be used as a musical instrument of that class, *Little v. G. E. Van Sycle & Co.,* 115 Mich., 480, 73 N. W., 554; a vessel built for a buyer must be seaworthy, 3 A. L. R., 622, annotation; a silo must preserve ensilage, *Indiana Silo Co. v. Harris,* 134 Ark., 218, 203 S. W., 581; an automobile must be capable of use as a vehicle, *Harvey v. Buick Motor Co.* (Mo. App.), 177 S. W., 774; a moving-picture screen must possess reflecting qualities *East End Amusement Co. v. Atmospheric S. Co.,* 171 N. Y. S., 283." See, also, *American Radiator Co. v. McKee,* 140 Ky., 105, 130 S. W., 977; *Parker v. Shaghelean Mass.,* Feb., 1823, 138 N. E., 236; *Kelsey v. J. W. Rengrose Nit. Co.,* 152 Wis., 499, 140 N. W., 66.

In *Swift v. Etheridge, supra,* it is held by this Court that manufacturers and vendors of commercial fertilizers, in this State, warrant that the fertilizers manufactured and sold by them contain chemical ingredients of the guaranteed analysis, required by statute to appear upon bags, barrels, or packages, in which they are delivered; this is a statutory warranty without which no commercial fertilizers may be sold in this State. C. S., 4690. It is similar to the statutory warranty required in the sale of "commercial feeding stuffs." C. S., 4724-4731; *Poovey v. Sugar Co.,* 191 N. C., 722. In this case it is held that a seller of "commercial feeding stuffs," as defined by law, must supply a commodity reasonably fit for the use contemplated by the parties to the

sale, and such as measures up to the requirements of the statute. A seller of commercial fertilizer to a farmer for use on crops, upon the same principle, must deliver to his vendee a commodity which fulfills the warranty implied by law, that it is reasonably fit for the use contemplated by the parties to the sale, and also fulfills the warranty required by statute, that it contains chemical ingredients of the guaranteed analysis.

A vendor who, by his contract, has agreed to sell and deliver to his vendee commercial fertilizers, cannot recover of his vendee the purchase price of such fertilizers, unless in his action to recover same he alleges and proves delivery, pursuant to his contract, of commercial fertilizers, containing chemical ingredients of the analysis guaranteed, as required by statute. A vendee, to whom goods have been delivered, as commercial fertilizers, to be used by him, in defense of an action by his vendor for the purchase price, whether evidenced by his note or otherwise, upon his plea of failure of consideration, may show that there has been a breach of the warranty, implied by law, that the goods are commercial fertilizers, and therefore capable by use upon land of increasing the yield of crops, and also that there has been a breach of the warranty required by statute, that commercial fertilizers sold in this State contain chemical ingredients of the analysis guaranteed by representations made on the bag, barrel, or package in which they are delivered. Evidence of a breach of warranty, express or implied, or as required by statute, is competent, not only in an action to recover damages for such breach, or upon counterclaim for such damages as a defense to recovery of judgment for the purchase price, but also to prove failure of consideration when such failure is pleaded in defense of a recovery of the purchase price of the goods sold, 8 C. J., 754. *Brantley v. Thomas,* 22 Tex., 270, 73 Am. Dec., 264, annotated; *Perley v. Balch,* 23 Peck (Mass.), 283, 34 Am. Dec., 56, annotated.

Parol evidence is competent, as between the original parties to a note, to show failure of consideration when pleaded as a defense. The admission of such evidence for this purpose is not in violation of the well-settled rule that parol evidence will not be admitted to alter, vary or contradict a written instrument. 3 R. C. L., p. 139, sec. 139, note 3, and cases cited. In note to *Pryor v. Ludden & Bates Southern Music House,* 134 Ga., 288, 67 S. E., 654, 28 L. R. A. (N. S.), 267, the editor says: "The weight of authority is in accord with the decision in *Pryor v. Southern Music House* in holding that the breach of a parol warranty may be shown as a defense *pro tanto* in an action between the original parties to a note given for the purchase price." Where the defense is total failure of consideration, defendant may show by parol evidence that the goods purchased by him were not delivered by plaintiff.

It is the contention of plaintiffs upon this appeal that evidence as to the results of the use of Swift's 8-3-3, upon defendant's land, during years previous to 1922, and during the year 1922, for the purpose of proving defendant's allegation that the fertilizers delivered and used by him in 1922, was not Swift's 8-3-3, as purchased by him, was incompetent and not admissible: first, because of the stipulation in the note that commercial fertilizers were sold to defendant without any warranty as to results from its use, or otherwise; second, because under C. S., 4697, no suit for damages from results of use of fertilizers may be brought in this State except after chemical analysis, showing a deficiency of ingredients; and third, because such evidence has no probative value, and is uncertain and speculative.

First. The stipulation in the contract of sale, as recited in the note, that there was no warranty as to results of the use of the fertilizers, or otherwise, is not a contractual rule of evidence agreed upon by the parties, for the purpose of excluding evidence as to such results, which would otherwise be competent. *Fertilizer Works v. Aiken,* 175 N. C., 398; *Carter v. McGill,* 171 N. C., 775, *S. c.,* 168 N. C., 507; *Guano Co. v. Livestock Co.,* 168 N. C., 442; *Germofort v. Cathcart,* 104 S. C., 125; *Allen v. Young,* 62 Ga., 617. Its manifest purpose was to relieve plaintiffs of liability for damages for a breach of a warranty, which in the absence of such stipulation, would have been implied by law. It cannot be held that it has any further effect than to accomplish this purpose. *Fert. Works v. Aiken, supra; Guano Co. v. Livestock Co., supra; Piano Co. v. Kennedy,* 152 N. C., 196. The stipulation is not broad enough to exclude, and does not exclude as evidence to sustain defendant's plea of failure of consideration, testimony as to the effect of the use upon defendant's crop of the fertilizer delivered to him by plaintiff. It ought not and cannot be held as law that a vendor who has sold a well-known article which has value only for a definite, specific purpose, by implication of law, warrants that the article delivered is the article sold, and may in the contract of sale stipulate that he shall be relieved of his obligation to deliver the very article which he has agreed to deliver in performance of his contractual obligation. The parties to a contract may by stipulation agree upon a rule of evidence to be applied in a controversy between them as to the subject-matter of the sale; they may agree as to the damages which either may recover for a breach of the contract by the other; they may, by stipulation, limit the liability of one of the parties to the other by reason of his contractual obligations; a stipulation, however, by which the vendee would be liable for the full purchase price as fixed by the contract, for the goods sold, although the vendor has failed to deliver goods in accordance with his contract, presents a different question. Stipulation in the

note upon which this action is brought, may be enforceable in an action to recover damages by the vendee of the vendor, resulting from the use of the fertilizer; it cannot be construed, however, as relieving plaintiffs of their obligation under the contract, to deliver to defendant commercial fertilizers, which, when used upon land, will increase the yield of crops planted and cultivated thereon. To hold with plaintiff's contention, would permit a vendor to sell his vendee commercial fertilizers and to recover the full purchase price as fixed by the contract of sale, whether the article delivered to the vendee was commercial fertilizer or not. Plaintiffs neither desire nor seek this result, for they insist that they have fully complied with their contract of sale; defendant, however, contends otherwise; the issue of fact thus raised and submitted to a jury must be determined by evidence, to be considered by the jury, under proper instructions as to the law applicable to such evidence.

Second. The validity of C. S., 4697 was challenged in *Jones v. Guano Company,* 183 N. C., 338, 264 U. S., 171, 68 L. Ed., 623, on the ground that it is unreasonable in its provisions and impossible of fulfillment; it was contended also that the statute is unconstitutional. The challenge was not sustained in this Court. In the opinion written for this Court by *Stacy, J.,* it was held that the statute was not unreasonable, or unconstitutional. The judgment dismissing that action, which was to recover damages resulting from the use of fertilizers on crops, upon the allegation that the fertilizers were deficient in chemical ingredients, because of failure to comply with C. S., 4697, with respect to a chemical analysis, was affirmed. It is said, "There is nothing in the statute which impairs the right of contract, and we think it is constitutional. *Fertilizing Co. v. Thomas,* 181 N. C., 274." A chemical analysis, showing deficiency in chemical ingredients is a condition precedent to an action to recover damages, or to defeat or reduce recovery on note for the purchase price by counterclaim for damages, unless the parties to the sale contract otherwise, as provided by the statute. On writ of error to the Supreme Court of the United States, the statute was sustained in an opinion written by *Butler, J.,* as not repugnant to either the due-process clause or the equal-protection clause of the 14th Amendment. It is said: "The 14th Amendment does not prevent a state from prescribing a reasonable and appropriate condition precedent to the bringing of a suit of a specified kind or class so long as the basis of distinction is real and the condition imposed has reasonable relation to a legitimate object." The statute, by its express terms applies only to an action to recover damages, and prescribes as a condition precedent to the bringing of such an action, a chemical analysis, showing a deficiency in chemical ingredients. It has been held to apply to a counterclaim for damages by a vendee to offset or reduce the amount which

the vendor is entitled to recover as the purchase price. *Pearsall v. Eakins,* 184 N. C., 291. There is nothing in the statute, however, which by reasonable construction, makes it applicable to a defense by the vendee upon his plea of total failure of consideration, involving identity of the goods delivered with the goods sold. There is no statutory condition precedent to the defense of failure of consideration in an action to recover the purchase price of commercial fertilizers, evidenced by vendee's note where such defense is available to him by C. S., 3008, nor is there any statutory rule requiring a chemical analysis as evidence to show deficiency of chemical ingredients upon vendee's allegation that the fertilizers delivered were not the fertilizers bought because of such deficiency. Testimony as to the results of the use of commercial fertilizers, upon crops, without a chemical analysis, by virtue of C. S., 4697, is not competent as evidence in an action by the vendee to recover damages of the vendor or upon a counterclaim by the vendee for damages in an action to recover the purchase price brought by the vendor; such testimony is not incompetent, however, by virtue of the statute, where the issue upon a plea of total failure of consideration involves only the identity of the goods delivered with the goods sold. A contract to sell commercial fertilizers of a guaranteed analysis as to chemical ingredients is not performed by the delivery of fertilizers containing ingredients of a different analysis; farmers in this State who contract to purchase commercial fertilizers containing chemical ingredients of a certain guaranteed analysis have learned by experience and observation that different crops, and lands of different qualities, require for satisfactory results from their use, fertilizers of different analysis as to essential ingredients. Scientific experiments, made from year to year under the supervision of the Department of Agriculture, or by manufacturers of commercial fertilizers themselves, confirm the lesson learned by practical farmers from their experience and observation. Manufacturers of commercial fertilizers recognize this fact; profiting by the results of experiments made by them and by others, they vary the analyses of their fertilizers to meet the different requirements of their customers, dependent upon the crops which they make, and upon the land on which the fertilizer is used. It cannot be held that a contract for the sale of fertilizers of a certain guaranteed analysis, which the vendee has purchased for use upon his land, in growing crops thereon, has been fulfilled by the delivery of fertilizers of a different analysis, or that the statute, C. S., 4697, excludes as evidence testimony as to the effect of fertilizers delivered and of fertilizers sold, which would, but for the statute, be competent upon an issue involving only the defense of failure of consideration, for that the fertilizers delivered were not the

fertilizers bought. Experienced farmers have no difficulty, while crops are growing, or after they have matured, in determining as a basis for the exercise of judgment in purchasing fertilizers, whether any fertilizers have been used under them or not, or whether fertilizers used under one crop are the same, for all practical purposes, as fertilizers used under another crop, on the same land, during different years, when the method of cultivation and the growing seasons for the different years are practically the same. Their ability to do this, in their opinion, justifies the expenditure each year by the farmers of this State of large sums of money in the purchase of commercial fertilizers. The manufacture and sale in this State of commercial fertilizers have grown to large proportions because the farmers of the State have learned that there is practical as well as scientific justification for the purchase and use of commercial fertilizers in growing crops on lands in this State.

Third. Testimony tending to show the effect of commercial fertilizers of the guaranteed chemical analysis, purchased by defendant of plaintiffs, upon crops of previous years, and the effect of the fertilizer delivered and used on the crops of 1922 offered as evidence by defendant to sustain his contention that the latter was not of the analysis guaranteed, was not incompetent because it lacked probative value, was uncertain and speculative. Defendant has laid the foundation for the admission of such evidence, in accordance with opinions of this Court.

In *Guano Co. v. Livestock Co.,* 168 N. C., 442, L. R. A. 1915 D, *Justice Walker,* writing the opinion for this Court, says: "We are of the opinion that notwithstanding the stipulation as to nonliability for results, evidence of the effect of any particular fertilizer upon crops is competent, under certain conditions, to prove that it did not contain the guaranteed ingredients, or in the proportions specified on the label put on the bag." He cites, in support of the opinion in this respect, the following quotation from *Jones v. Cordele Guano Co.,* 94 Ga., 14: "While it is true that the note sued on in the present case contained an express stipulation that the makers purchased on their own judgment and waived any guarantee as to the effects of the fertilizers on their crops, we think they are nevertheless entitled to show that their crops derived no benefit from the use of the fertilizers in question. It was competent for them to do this, not for the purpose of repudiating or varying the terms of their written contract, or of holding the guano company to a guarantee it had expressly declined to make, but to show that in point of fact the guano did not come up to the guaranteed analysis branded on the sacks, as required by law. In other words, it was the right of defendants to show that this guano did not contain the chemical ingredients set forth in the analysis. If the guano failed to produce any beneficial effect on the crops, under favorable auspices,

this fact would at least tend to show that it did not contain the fertilizing elements in the proportions specified in the analysis branded on the sacks." Evidence as to the effect of the fertilizers upon crops is held to be admissible, not only for the purpose of corroboration, but also as substantive evidence, for, says the learned *Justice,* whose opinion gives evidence of his usual care and exhaustive investigation of authorities, "As Cervantes wisely said in his *Don Quixote,* 'the proof of the pudding is the eating,' and by analogy the proof of the fertilizer is the using of it. It is practical instead of scientific proof, but the evidence should be admitted, cautiously and with proper and full safeguards so as by eliminating the speculative elements to show clearly the causal connection between the fertilizer used and the loss or diminution of the crop. Unless the foundation for such proof is well laid, it lacks in probative force as it has not been removed from the realm of speculation, and is only conjectural, and, of course, unreliable." *Tomlinson v. Morgan* is cited with approval as sustaining the decision, although it is said that there is a radical difference between the facts in the two cases. *Guano Co. v. Livestock Co.,* and *Tomlinson v. Morgan* have not been overruled in subsequent decisions of this Court; the law, as stated in the opinions in these cases, with respect to the admissibility of testimony as to the effect of fertilizers used upon crops, as evidence, has not been applied in subsequent decisions because it was held that the parties to the actions in which these decisions were rendered by contract stipulated that such evidence should not be competent in such actions, or that by virtue of the act of 1917, C. S., 4697, such actions could not be brought or maintained, except after a chemical analysis had been made.

It should be noted that in *Guano Co. v. Livestock Co.,* the vendee was a merchant who had purchased the fertilizers for sale to customers, whereas in the instant case the vendee is a farmer, who purchased the fertilizer for use under his crops. In *Carter v. McGill,* 168 N. C., 507, the defendant was a farmer who purchased fertilizers, which he alleged were deficient, from plaintiff, who was a merchant. Testimony as to the effect of the fertilizers upon defendant's crops was held competent as evidence to show breach of warranty implied by law that it was fit for use as commercial fertilizer. *Justice Walker* again says in his opinion in that case that "the purchaser of fertilizers may show a breach of warranty by evidence as to the effect of the fertilizer upon his crops, provided he first lays the foundation for such proof by showing that it was used under conditions favorable to a correct test of its value, such as land adapted to the growth of a particular crop for which it was purchased, proper cultivation and tillage, propitious weather or seasons, the general purpose being to exclude any element

which would render the evidence uncertain as to the cause of the loss or diminution of the crop, or rid it of its speculative character." Upon a rehearing the judgment was affirmed, 171 N. C., 775.

Since the opinions in *Carter v. McGill* were written, C. S., 4697 has been amended, providing now that no suit for damages from results of use of fertilizer may be brought except after analysis. By virtue of this statute, where there was no stipulation to the contrary in the contract of sale, as provided therein, it has been held in several cases that testimony as to the results of the use of fertilizers upon crops was properly excluded for the reason that no analysis showing deficiency of chemical ingredients in the fertilizers brought in question had been made. It was so held in actions to recover damages or to defeat recovery for purchase price by damages set up as counterclaim. *Fertilizer Works v. Aiken,* 175 N. C., 398; *Fertilizing Co. v. Thomas,* 181 N. C., 274. It has not been held, however, that such testimony is incompetent where the issue involves only the identity of fertilizers delivered with fertilizers sold and arises upon a plea of failure of consideration in defense of an action to recover the purchase price for the goods sold.

We, therefore, hold that plaintiffs' assignments of error based upon exceptions to the testimony offered by defendant are not sustained.

Defendant assigns as error (1) the submission of the second and third issues to the jury; (2) the refusal of the court to strike out these issues, with answers thereto; and (3) the refusal of the court to sign judgment tendered by defendant upon the answer to the first issue.

These assignments of error must be sustained. The issues excepted to do not arise upon the pleadings and we must hold that it was error to submit them to the jury, and to refuse to strike the issue, and the answers thereto from the record. We fail to find in the case on appeal any evidence as to the value of the fertilizers delivered by plaintiffs to defendant, which the jury has found were not the fertilizers which plaintiffs by their contract of sale, had agreed to deliver to defendant. The burden was upon plaintiffs to show that the fertilizers delivered had value and what such value, if any, was. Plaintiffs offered no evidence.

The jury having answered the first issue "Yes," and thereby sustained the plea of failure of consideration, it was error to refuse to sign the judgment tendered by defendant. The action must be remanded that judgment may be signed in accordance with this opinion. Such judgment will not bar plaintiffs' right, if any they have, to recover, in another action, the value of the fertilizers delivered to defendant, which cannot now be returned because they have been used by him. In order that judgment may be rendered in accordance with this opinion, the action is

Remanded.

STACY, C. J., concurring in part:

1. The stipulation contained in the note deals with the question of the defendant's liability and excludes all warranties as to the results from the use of the fertilizers, or otherwise, except the one implied by law and necessary to create a legal obligation when all other warranties are negatived, to wit, that the goods manufactured by plaintiff and sold to the defendant as fertilizers are fertilizers and fit to be used as such. *DeWitt v. Berry,* 134 U. S., 306; *Furniture Co. v. Mfg. Co.,* 169 N. C., 41. It is not to be supposed, from the language employed, that the seller intended to sell and the purchaser intended to buy an utterly worthless article; for a bare agreement, with no consideration to support it, would be a *nudum pactum* and therefore unenforceable. *Swift & Co. v. Etheridge,* 190 N. C., 162; *Ashford v. Shrader,* 167 N. C., 45. It is established, by the clear weight of authority, that where there is a total failure of consideration, and the defendant has derived no benefit from the contract, such total failure, or want, of consideration may be shown in bar of plaintiff's right to recover on the contract. *Morrow v. Hanson,* 9 Ga., 398, 54 Am. Dec., 346; 6 R. C. L., 684.

Of course, as a man consents to bind himself so shall he be bound. *Nash v. Royster,* 189 N. C., 408. Such is the simple law of contract. *Clancy v. Overman,* 18 N. C., 402. But an agreement to pay a manufacturer for an article, intended by both buyer and seller to be used for some purpose, which turns out to be utterly worthless and unfit for use, is not enforceable in the courts, because of a want of consideration to support it. *Register Co. v. Bradshaw,* 174 N. C., 414; 6 R. C. L., 686. It is believed that a promise, however, express, must be regarded as *nude pact,* and not binding in law, if founded solely on considerations which the law holds altogether insufficient to create a legal obligation. *Hatchell v. Odom,* 19 N. C., 302. "If it (the article sold) be of no value to either party, it of course cannot be the basis of a sale"—*Ashe, J., in Johnston v. Smith,* 86 N. C., 498. And in the instant case, a stipulation that there is no warranty against the worthlessness of the fertilizers manufactured and sold by the plaintiff, if such it be, could avail nothing, if, in fact, the goods delivered were not fertilizers and were wholly valueless. Elliott on Contracts, Vol. I, p. 444, sec. 254. The stipulation cannot take the place of consideration, and it would fall with the balance of the contract for want of consideration. *Furniture Co. v. Mfg. Co.,* 169 N. C., 41. (Hearse case.)

This position is not at variance with the well-established rule that, in the sale of personal property, "an express warranty of quality excludes any implied warranty that the articles sold were merchantable or fit for their intended use." *DeWitt v. Berry,* 134 U. S., 306. Here,

there is no express warranty of quality; just the reverse, a refusal so to warrant, taking the plaintiff's interpretation of the contract, but the law requires the plaintiff, a manufacturer, to warrant that the goods sold as fertilizers are fertilizers, not that they will produce crops, but that they are fertilizers. *International Pavement Co. v. Smith,* 70 Mo. App., 264; *Johnson v. Latimer,* 71 Ga., 478. A manufacturer of goods may not take money from a customer under an agreement to deliver certain designated articles of merchandise, and then, by a bare stipulation in the contract, relieve himself from any and all obligation to deliver the articles sold, or any thing of value. And where a manufacturer agrees to sell fertilizers, he must deliver fertilizers, or else there is no consideration for the contract. *Hurlburt v. Kephart,* 50 Colo., 353.

Where there is an express warranty of quality in the sale of personal property, the law will imply no other, and the parties are remitted to their agreement *(Robinson v. Huffstetler,* 165 N. C., 459), but where there is no express warranty of quality of goods sold by a manufacturer, the law requires the manufacturer to deliver merchantable goods, or such as are suited to the known purposes of the buyer. *Dushane v. Benedict,* 120 U. S., 630.

In 13 C. J., at p. 367, under the heading "Failure of Consideration," it is said: "Strictly speaking there can, according to many respectable authorities, be no such thing as a failure of consideration. A promisor either receives the consideration he has bargained for or he does not. If he does not, there is no enforceable agreement, for there is no consideration. If the promisor gets what he bargains for there is no failure of consideration, although what he receives becomes less valuable or of no value at all. Failure of consideration is in fact simply want of consideration. Nevertheless it is laid down in a number of cases that when the consideration for a promise wholly fails the promise is without consideration and unenforceable. But this must mean that in a contract with an executory consideration, the execution of the consideration is a condition precedent to the liability on the promise, and the failure to execute the consideration discharges the promisor."

See, also, *Loxterkamp v. Lininger Implement Co.,* 147 Iowa, 29, as reported in 33 L. R. A. (N. S.), 501, with valuable note by the annotator.

The case of *Guano Co. v. Livestock Co.,* 168 N. C., 442, correctly states the law as applied to the facts of that case. The evidence there offered did not go to a want, or failure, of consideration, but to the inferiority of the goods delivered under the contract. Herein lies the distinction between that case and the case of *Swift & Co. v. Etheridge,* 190 N. C., 162. Likewise, the cases of *Fertilizing Co. v. Thomas,* 181 N. C., 274, *Fertilizer Works v. Aiken,* 175 N. C., 398, and *Tomlin-*

son v. Morgan, 166 N. C., 557, are distinguishable by reason of the peculiar facts appearing in each case.

2. The statute, C. S., 4697, deals largely with the question of evidence, and provides that no suit for shortage, or damage to crops, resulting from the use of fertilizers, may be brought, except after chemical analysis showing deficiency of ingredients, unless the dealer has been selling goods that are outlawed by the statute, or has offered for sale in this State, during the season, dishonest or fraudulent goods. *Pearsall v. Eakins,* 184 N. C., 291; *Jones v. Guano Co.,* 183 N. C., 338; *Fertilizer Works v. Aiken,* 175 N. C., 398. The pertinent provision of the statute is as follows: "*Provided,* that no suit for damages from results of use of fertilizer may be brought except after chemical analysis showing deficiency of ingredients, unless it shall appear to the department of agriculture that the manufacturer of said fertilizer in question has, in the manufacture of other goods offered in this State during such season, employed such ingredients as are outlawed by the provisions of this article, or unless it shall appear to the department of agriculture that the manufacturer of such fertilizer has offered for sale during that season any kind of dishonest or fraudulent goods."

The chemical analysis is not required to be completed before the fertilizers are used or put in the ground; samples may be taken, the analysis made later and preserved as evidence to be used in case damages are sustained as a result of the use of the fertilizers.

Speaking to the question in *Jones v. Union Guano Co.,* 264 U. S., 171, *Mr. Justice Butler* said: "The act does not deprive purchasers of any right or cause of action. On the contrary, it gives additional rights and remedies to one who purchases for his own use fertilizer below the guaranteed value in plant food. The terms of the statute are not made exclusive. Under the act the parties were free to deal on other terms. *Fertilizer Works v. Aiken,* (1918) 175 N. C., 398, 402; *Fertilizing Co. v. Thomas,* (1921) 181 N. C., 274, 283. The ingredients of fertilizers can be ascertained definitely by chemical analysis. The department is required to provide chemists and equipment and to make and report analysis of all fertilizers sent in by purchasers or consumers. The requirement imposed is reasonable and seems well calculated to safeguard against uncertainty, conjecture and mistake. The analysis is not made conclusive. Other evidence may be introduced by either party. The determination of the department is not substituted for a trial in court."

But this statute, C. S., 4697, it would seem, was not intended to apply to a case like the present. The plaintiff is suing on a negotiable instrument, and C. S., 3008 provides that an absence or failure of consideration is a matter of defense as between the original parties to a

negotiable instrument, and partial failure of consideration is a defense *pro tanto*, whether the failure be an ascertained and liquidated amount or otherwise. The defendant is not suing to recover for shortage or damage to his crops resulting from the use of the fertilizers, but he is setting up, under the negotiable instrument law, an absence or failure of consideration, as a defense to the note sued on.

He may offer evidence tending to show the want of results from the use of the article furnished by plaintiff, if a proper basis be laid therefor, not for the purpose of repudiating or varying the terms of his written contract, or of holding the guano company to a warranty it has expressly declined to make, but to show, if he can, a failure of consideration, which, if established, is a valid defense to the note in suit. *Tomlinson v. Morgan,* 166 N. C., 557; *Jones v. Cordele Guano Co.,* 94 Ga., 14. And by what better evidence, in the absence of a chemical analysis, can the defendant demonstrate the worthlessness of the article furnished than to show that it had no effect on his crops? "The proof of the pudding is the eating," says Cervantes in his *Don Quixote,* and so by analogy the proof of the fertilizer is the using of it. True, this kind of evidence is not scientifically accurate, and it should be admitted cautiously, with proper safeguards, nevertheless, it has some probative value and is not wholly conjectural. *Guano Co. v. Livestock Co.,* 168 N. C., 442. It is not excluded by the stipulation in the contract, or by the provisions of the statute.

The defendant, in effect, says to the plaintiff: "I am not asking for anything on acccount of the failure of my crop, though you may have occasioned it. This loss I am compelled to bear, both because of the stipulation in the contract and the terms of the statute, it being conceded that no chemical analysis was made by the State chemist. But under a contract to purchase fertilizer, I ought not to be required to pay for something that is not fertilizer, or for a fertilizer that has not been delivered."

The extent of the plaintiff's liability, under this interpretation, is limited to the price agreed to be paid for the fertilizer, and if the article delivered be worthless, the plaintiff has no just ground for complaint. It is enough that the defendant should lose his crops. This is all that his contract covers, and all that the statute contemplates. Why should he be compelled to pay for a worthless article, or denied the right to show that it is worthless, simply because he has agreed not to hold the plaintiff responsible for damages resulting from the use of fertilizers, and the statute precludes an action on his part for shortage, or damage to his crops, except after a chemical analysis showing deficiency of ingredients? He is not asking for such damages. His only request is that he be allowed to defend, in the present action, on the

ground of an absence or failure of consideration, which, if established is sufficient to defeat a recovery by the plaintiff. The defendant's right to disclaim liability on the note in suit, for want of consideration, has not been destroyed by agreement or taken away by the statute.

The note, being in form a negotiable instrument, imports prima facie a consideration, and where the defense of failure or want, of consideration is interposed to defeat a recovery, as in the instant suit, the burden, of course, is on the maker to establish the defense by the greater weight of the evidence. *Piner v. Brittain,* 165 N. C., 401; *Hunt v. Eure,* 188 N. C., 716.

But to my mind, the second defense "that said fertilizer did not contain the proper ingredients to produce good potatoes and to produce them for the early market, as represented by plaintiff," is not open to the defendant on the present record. The note was given after the fertilizer had been used, or put in the ground, and if it be conceded that it was fertilizer, fit to be used as such and having some value, then the parties have agreed upon the purchase price, represented by the amount of the note, and the defendant has stipulated that the plaintiff shall not be liable for failure of "results from its use or otherwise." If the defendant received the fertilizer for which the note was given, at the price agreed upon, and it had some value, he is bound by the contract which he thus voluntarily entered into. *Johnston v. Smith,* 86 N. C., 498; Elliott on Contracts (vol. 3), sec. 1891, 13 C. J., 368. It is not alleged that there was any fraud connected with the transaction. *Furst v. Merritt,* 190 N. C., 397.

In this view of the case, construing the answer to the first issue to be a finding that the article delivered was worthless, it would appear that the verdict is contradictory, hence, I think, the cause should be remanded for a new trial in accordance with the law as declared in the Court's opinion.

ELEANOR BIZZELL, BY HER GUARDIAN, LAURA S. BIZZELL, v. BOARD OF ALDERMEN OF THE CITY OF GOLDSBORO ET AL.

(Filed 20 October, 1926.)

1. Constitutional Law — Municipal Corporations — Ordinances — Filling Stations—Guardian—License—Discrimination.

The erection and maintenance of a gasoline filling station, in conformity with the statutory regulations and those conferred by statute, upon local municipal authorities, is not a nuisance, but involves the lawful property rights guaranteed by the Constitution of the United States (Fourteenth Amendment), and of the State.

2. Same—Discrimination—Police Powers.

A city ordinance which professes to regulate the erection and maintenance of gasoline filling stations within the incorporated limits thereof, providing in effect that permits for such stations shall not be granted without the consent of the board of aldermen of the city, is in violation of property rights guaranteed by the Constitution in not prescribing a uniform rule by which such permits may be obtained. The distinction between the conduct of a business that is not harmful and unsafe and those that are, and fully within the lawful exercise of the police power of a municipality, pointed out and distinguished by *Clarkson, J.*

3. Same—Discretionary Powers—Notice—Hearings—Courts — Abuse of Discretion—Appeal and Error.

Where the conduct of a business is lawful, and falls within the police powers of regulation by a municipality or such as may affect the public morals, health, etc., of the municipality, notice must first be given to one applying for license, or who is affected by the revocation of his license, and a hearing afforded him, and decision made according to the sound discretion of the municipal authorities with right of appeal to the courts as to whether the discretion vested in them had been arbitrarily or unjustly exercised or not.

4. Municipal Corporations—Constitutional Law—Ordinances—Mandamus.

Mandamus will lie to compel a municipal corporation to issue a license for a lawful business, in this case the erection and maintenance of a gasoline filling station within the corporate limits, unlawfully refused under an invalid municipal ordinance.

STACY, C. J., dissenting.

APPEAL by defendants from *Sinclair, J.,* from order at Chambers, April, 1926 of WAYNE.

This was an action by plaintiff against defendants that an alternate writ of mandamus be issued directing the building inspector of Goldsboro to issue permit, or for the building inspector and the other defendants to show cause why said permit should not be issued.

The plaintiff, in part, contends that she is the owner and in possession of a lot of land situated in the city of Goldsboro at the northwestern intersection of West Center and Ash Streets, that during the month of February, 1926, the plaintiff leased said lot of land to the Sinclair Oil Company, which company proposed erecting and operating a gasoline filling station on said land, and to that end the said company duly applied to the city of Goldsboro for a permit to construct and operate said station. That the building inspector of the city of Goldsboro is the officer created by law to pass upon applications for permits to construct buildings in the city of Goldsboro, and that it is the duty of said inspector to issue permits for the construction and operation of filling stations in the city of Goldsboro and to require the applicant to conform to the building laws of the State.

That at a regular meeting of the board of aldermen, held in the city of Goldsboro on 7 July, 1924, the board of aldermen adopted the three ordinances, as follows: "Be it ordained by the board of aldermen of the city of Goldsboro: That no gasoline filling or gasoline storage station shall hereafter be located, conducted or operated in the city of Goldsboro without first obtaining consent from the board of aldermen at some regular meeting thereof. Any person, firm or corporation, violating this ordinance shall, upon conviction, before the mayor, be fined $50 for each offense, and every day of such violation shall constitute a separate offense.

"Be it ordained, by the board of aldermen of the city of Goldsboro: That no gasoline filling or gasoline storage station shall start operation thereof in the city without first obtaining permission from the board of aldermen to do so at a regular meeting thereof. Any person, firm or corporation, violating this ordinance, shall, upon conviction before the mayor, be fined $50 for each offense, and every day of such violation shall constitute a separate offense.

"Be it ordained by the board of aldermen of the city of Goldsboro: That all permits heretofore issued for gasoline filling or gasoline storage stations in the city which are not already constructed, be and the same are hereby revoked."

That each of said ordinances is unconstitutional and void, and particularly objectionable in that they do not prescribe a uniform rule of action for governing the exercise of the discretion of the aldermen, but on the contrary leave the rights of property subject to arbitrary discretion of the board.

That having agreed with the plaintiff as to the terms of the lease referred to above, the Sinclair Oil Company applied to the board of aldermen of the city of Goldsboro for a permit to construct said filling station on the lot of the plaintiff, and the plaintiff, through her attorney likewise appeared before the board of aldermen requesting said permit; that the said aldermen refused to issue the permit.

That the plaintiff applied to the building inspector of the city of Goldsboro for a permit to construct said filling station and the said inspector refused to issue the permit.

That the lot of the plaintiff herein referred to is situated at the intersection of State Highway No. 10 and West Center Street, which is one of the principal business streets in the city of Goldsboro; eastwardly across the street from the plaintiff is the Durham Hosiery Mills; diagonally across the street is the filling station of the Texas Company; southwardly and across highway No. 10 a mercantile establishment, livery stable and blacksmith shop; on West Center Street and in front of the plaintiff's lot are the railroad tracks of the Southern, Atlantic Coast

Line and Norfolk Southern railroads. That the action of the city of Goldsboro in refusing to issue said permit was an arbitrary and unreasonable exercise of discretion and is unlawful.

That the filling station which plaintiff proposed erecting on said lot would comply in every respect with the building laws of the State of North Carolina and the ordinances and regulations of the city of Goldsboro, and that therefore the building inspector has no authority to reject said application, and, as the plaintiff is informed and believes, must issue said permit subject to the supervision by him of the construction and material as directed in C. S., 2748.

The defendant admits that the Sinclair Oil Company applied to the city of Goldsboro for a permit to construct and operate a gasoline station at the northwest intersection of East Center and Ash streets in the city of Goldsboro. It admits that, subject to statutory regulations and valid ordinances of the city of Goldsboro, and in some instances to prior consent by the board of aldermen, it is the duty of the building inspector of said city to pass upon permits for the construction of buildings. It is specifically denied that the special ordinances are unconstitutional or void or objectionable for any reason; and in this connection alleges that said ordinances constitute valid and constitutional exercise of power on the part of the board of aldermen of the city of Goldsboro. That the board of aldermen were induced to reach their decision by a number of reasons, among them the following: That the proposed location for a filling station is located within two blocks and a half of one of the primary schools of the city and on the direct route of the approach thereto, and that this fact, together with the fact that Ash Street (said street of approach to said school) is also a part of the Central Highway of North Carolina, would make the construction of a filling station on said corner a continual menace to the school children going to and from said school; that a further consideration was the fact that said proposed filling station would be located adjoining a residential section of said city, and that there is no business necessity requiring the erection of a filling station on said corner, in view of the fact that there are five other filling stations not far removed from the proposed site.

The court below rendered the following judgment:

"This cause coming on to be heard before his Honor, Sinclair, J., at chambers, and being heard upon the verified complaint and answer, and upon affidavits filed by the city of Goldsboro herein and upon argument of counsel for the plaintiff and counsel for the defendants, and it appearing to the Court after a full consideration of said pleadings, affidavits and arguments that the plaintiff is entitled to the relief demanded in the complaint. It is thereupon considered, ordered and

adjudged that the building inspector of the city of Goldsboro be and he is hereby ordered and directed to issue a permit to the plaintiff for the construction of a filling station upon the lot described in the complaint, subject to the conformance by the plaintiff with the building laws of the State of North Carolina."

Hugh Dortch and Dickinson & Freeman for plaintiff.
D. C. Humphrey and Kenneth C. Royall for defendants.

CLARKSON, J. The sole question presented: Are the ordinances valid or void? We are of the opinion they are void.

In *S. v. Deposit Co.,* 191 N. C., 645, it was said: "The police power of a state is broad and comprehensive. It is elastic so that the governmental control may be adequate to meet changing social, economic and political conditions. Under the United States Constitution the police power has been left to the states—in fact it is inherent in the states. Each state has the power to regulate the relative rights and duties of all persons, individuals and corporations within its jurisdiction for the public convenience, welfare and good—for public health, public morals and public safety. The only limit is that no law shall be enacted repugnant to the Constitution of the United States (14th Amendment) or the State. *Durham v. Cotton Mills,* 141 N. C., 615; *Shelby v. Power Co.,* 155 N. C., p. 196; *Shields v. Harris,* 190 N. C., 527; *Moore v. Greensboro, ante,* p. 592; 6 R. C. L., sec. 188-190."

In *Weaver, Chief of the Bureau of Inspection,* etc., of *Penn. v. Palmer Bros. Co.,* Supreme Court of U. S. Advance Opinions, p. 366 (70 Law Ed.), the facts succinctly were: Palmer Bros. Co., a Connecticut corporation, had a large factory in Connecticut, in which for more than a half century it had manufactured *comfortables* in that state and had sold them there and elsewhere, and in the State of Pennsylvania. In Pennsylvania a law was passed regulating the manufacture, sterilization and sale of bedding. In the act the definition of "shoddy" was, "any material which has been spun into yarn, knit or woven into fabric, and subsequently cut up, torn up, broken up or ground up." It was made a violation of law, punishable by fine or imprisonment to make comfortables with "shoddy" or to sell comfortables made with "shoddy." The evidence disclosed by eminent public health scientists is that in the absence of sterilization or disinfection, there would be little if any danger to the health of the users of comfortables filled with "shoddy." There was no evidence that any sickness or disease was ever caused by the use of "shoddy." *Mr. Justice Butler,* writing the majority opinion, says: "The constitutional guaranties may not be made to yield to mere convenience, *Schlesinger v. Wisconsin,* decided 1

March, 1926, ... U. S., ... *ante,* 301, 46 Sup. Ct. Rep., ... The business here involved is legitimate and useful; and, while it is subject to all reasonable regulation, the absolute prohibition of the use of shoddy in the manufacture of comfortables is purely arbitrary and violates the due process clause of the 14th Amendment. *Adams v. Tanner,* 244 U. S., 590, 596; *Meyer v. Nebraska,* 262 U. S., 390; *Jay Burns Baking Co. v. Bryan,* 264 U. S., 504." *Mr. Justice Holmes,* dissenting, said: "In this case, as in *Schlesinger v. Wisconsin,* I think that we are pressing the 14th Amendment too far." Concurring were *Mr. Justice Brandeis* and *Mr. Justice Stone.*

In *S. v. Yopp,* 97 N. C., p. 481, *Merrimon, J.,* said: "Such statutes are valid unless the purpose or necessary effect is not to regulate the use of property but destroy it." *S. v. Whitlock,* 149 N. C., 542; *Standard Oil Co. v. City of Kearney,* 106 Neb., p. 558.

C. S., chap. 56, Municipal Corporations, Art. 11, provides for "Regulation of Buildings" for protection against fire, etc., in municipalities. In this chapter the Legislature has laid down stringent rules in regard to the regulation of buildings within and without the fire limits of the municipalities. It is compulsory on municipalities to establish fire limits. It provides for the building inspector to grant building permits. It provides in certain localities the material, etc., to be used. A comprehensive safety regulation of buildings is provided by law for municipalities.

Under Art. 15, General Powers of Municipal Corporations are enumerated. C. S., 2787, subsec. 6, is as follows: "To supervise, regulate, or suppress, in the interest of public morals, public recreations, amusements and entertainments, and to define, prohibit, abate or suppress all things detrimental to the health, morals, comfort, safety, convenience, and welfare of the people, and all nuisances and causes thereof." C. S., 2787, subsec. 16, is as follows: "To regulate, control, and prohibit the keeping and management of houses or any building for the storage of gunpowder and other combustible, explosive, or dangerous materials within the city, and to regulate the keeping and conveying of the same, and to authorize and regulate the laying of pipes and the location and construction of houses, tanks, reservoirs, and pumping stations for the storage of oil and gas."

The board of aldermen of the city of Goldsboro passed an ordinance, the material one that concerns us here, *prohibiting gasoline filling or gasoline storage stations to be located, conducted or operated in the city of Goldsboro without first obtaining consent from the board of aldermen at some regular meeting thereof.*

The plaintiff contends that the ordinance is unconstitutional and void, that it vests arbitrary discretion with respect to an ordinary law-

ful business in public officials, without prescribing a uniform rule of action or making uniform regulations applicable to all alike.

In *S. v. Tenant,* 110 N. C., p. 609, *"Mission Hospital case,"* the ordinance was as follows: "That no person, firm or corporation shall build or erect within the limits of the city any house or building of any kind or character, or otherwise add to, build upon or generally improve or change any house or building, *without having first applied to the aldermen and obtained a permission for such purpose."* The Court said: "If an ordinance is passed by a municipal corporation, which, upon its face, restricts the right of dominion which the individual might otherwise exercise without question, not according to any general or uniform rule, but so as to make the absolute enjoyment of his own depend upon the arbitrary will of the governing authorities of the town or city, it is unconstitutional and void, because it fails to furnish a uniform rule of action and leaves the right of property subject to the despotic will of aldermen who may exercise it so as to give exclusive profits or privileges to particular persons, *Newton v. Belger,* 143 Mass., 598; *City of Richmond v. Dudley,* Northern Reporter, vol. 28, No. 13, p. 312; *Yick Wo v. Hopkins,* 118 U. S., 356; *May v. People,* 27 Pac. Rep., 1010; *Baltimore v. Rodeck,* 49 Md., 217; *Anderson v. City of Wellington,* 40 Ka., 173; *In re Frazee,* 63 Mich., 396; *Tugman v. Chicago,* 78 Ill., 405; *Village of Braceville v. Doherty,* 30 Ill. Ap., 645; *Barthel v. City of New Orleans,* 564; *Bolls v. City of Goshen,* 117 Ill., 221; *Lake View v. Lutz,* 44 Ill., 81; Horr & Bemis on Mun. Police Ordinances, sec. 13; *Evansville v. Martin,* 41 Ind., 145." The *City of Plymouth v. Schultheis,* 135 Ind., p. 339; *City of St. Louis v. Russell,* 20 L. R. A., p. 721 (Mo.), (the latter case citing *S. v. Tenant, supra).*

In *S. v. Bass,* 171 N. C., p. 781, it was said: "Stables are not *per se* nuisances at common law, to be abated regardless of the manner in which they are kept. *Dargan v. Waddill,* 31 N. C., p. 244." In the *Bass case,* the *Tenant case, supra,* was approved. The ordinance declared void was to the effect that no person or persons, firm or corporation, shall build or cause to be *erected stables or stalls nearer to a neighbor's residence than it is to the owner's.* The court further said (pp. 781-782): "Its purpose is presumed to be to improve the health of the inhabitants of the town, as well as to minister to their comfort. It fails conspicuously to accomplish such purpose, as under it stables may be kept with impunity obnoxiously near any number of dwellings if they are equally as near the dwelling of the owner of the stables. Thus it is put within the power of the owner to annoy his neighbor at will if he is willing to endure the same annoyance himself. An ordinance to be valid *must be uniform in its application to all citizens*

and afford equal protection to all alike. It must not discriminate in favor of one person or class of persons over others. To be valid it must furnish a uniform rule of action. (Italics ours). *S. v. Tenant,* 110 N. C., 612. It must operate equally upon all persons, as well as for their equal benefit and protection, who come or live within the corporate limits. 1 Dillon Mun. Corp., sec. 380; *S. v. Pendergrass,* 106 N. C., 664; *S. v. Summerfield,* 107 N. C., 898."

The construction of a filling station dealing with property rights, cannot be placed in a class with one applying for a license to operate a poolroom or dance hall, etc., which is a privilege as distinguished from a legitimate business in which one is authorized to engage as a matter of right. We think this distinction has been clearly recognized in this State. *Brunswick-Balke Co. v. Mecklenburg,* 181 N. C., 386; *S. v. Vanhook,* 182 N. C., 831.

In *Brunswick-Balke Co. v. Mecklenburg, supra,* p. 388, *Hoke, J.,* speaking to the question, says: "In *S. v. Tenant,* 110 N. C., 609, the case in this State chiefly relied upon by appellant, involved the validity of an ordinance of the city of Asheville, which prohibited any and all owners of property within the city from building or erecting anywhere in the city limits any house or building of any kind or character or adding to or altering any house or building already constructed without first obtaining permission from the board of aldermen. The court held the ordinance void, as an unwarranted interference with the ordinary incidents of ownership, at the arbitrary will of the board of aldermen without valid reason had or assigned for their action, and as having no reasonable relation to the exercise of the police powers vested in the board for the well ordering of the town."

In *Hanes v. Carolina Cadillac Co.,* 176 N. C., p. 351, it is held: "Automobiles are of such general use that they have become a part of the daily life of our people in business as well as for pleasure. Public garages and supply stations are essential and cannot well be dispensed with. *The establishment of such public conveniences even in residential sections of cities and towns have been held not to be a nuisance per se.* (Italics ours). *Sheman v. Lexington,* 128 N. Y., 681. It has been further held that the storage of gasoline in suitable tanks set well down in the earth does not constitute a nuisance *per se. Harper v. Standard Oil Co.,* 78 Mo., 338; *Cleveland v. Gaslight Co.,* 20 N. J. Eq., 201."

In *Refining Co. v. McKernan,* 179 N. C., p. 314, applicable to gasoline, etc., the ordinance applied to all classes alike, no discrimination, no discretionary power given as in the present case.

It is to be seen that this Court has held that the business of dealing in gasoline and oil is legitimate business in municipalities and not a

nuisance *per se,* so all persons have the right to engage in this business upon equal terms and conditions. Some courts classify this business with pawnbrokers, poolrooms and dance halls, which have been held to be mere privileges and not classified as legitimate business.

In *Small v. Edenton,* 146 N. C., 530, it is said: "The reasonableness of an ordinance is for the court, the jury being called in to find the facts when in dispute."

In *Barger v. Smith,* 156 N. C., p. 323, a town ordinance prohibited the erection of any saw mill or other steam mill *within certain boundaries.* It is said, at p. 324: "'An ordinance must not be oppressive or discriminating, but must be reasonable and lawful.' 2 Dill. Mun. Corp. (5 ed.), sec. 589; 2 Abb. Mun. Corp., sec. 545. When an ordinance is 'within the grant of power to the municipality, the presumption is that it is reasonable, unless its unreasonable character appears upon its face. But the courts will declare an ordinance to be void because unreasonable upon a state of facts being shown which makes it unreasonable.' *Ibid.,* sec. 591, and cases there cited. It is further said that 'an ordinance must be impartial, fair and general. It would be unreasonable and unjust to make under the same circumstances an act done by one person penal and done by another not so. Ordinances which have this effect cannot be sustained. Special and unwarranted discrimination or unjust or oppressive interference in particular cases is not to be allowed.' *Ibid.,* 593."

In *S. v. Rice,* 158 N. C., p. 655, in the interest of health an ordinance was sustained forbidding keeping of hogs and pigs (a nuisance *per se*) within one-fourth mile of the city limits of Greensboro. The Legislature giving police power for sanitary purposes to the territory one mile beyond the city limits. A like ordinance in *S. v. Hord,* 122 N. C., p. 1092, was sustained forbidding keeping a hog 100 yards from another's dwelling, etc. There is no discrimination in either of these cases for it forbids all citizens alike.

In *Lawrence v. Nissen,* 173 N. C., p. 363, it is said: "The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws. This is the rule laid down by the Supreme Court of the United States in *Soon Hing v. Crowley,* 113 U. S., 709. It is those restrictions imposed upon one class of persons engaged *in a particular business,* which are not imposed upon others engaged in the same business and under like conditions, that impair the equal right which all can claim in the enforcement of the laws." *S. v. Denson,* 189 N. C., p. 173.

In *Turner v. New Bern,* 187 N. C., p. 541, the principle was laid down: Under the provisions of C. S., 2787, and under the provisions of its charter authorizing a city to pass needful ordinances for its government not inconsistent with law to secure the health, quiet, safety—general welfare clause—within its limits, etc., it is within the valid discretionary exercise of the police powers of the municipality to pass an ordinance forbidding the erection of lumber yards within a long established, exclusively residential portion, and when this discretionary power has not been abused the courts will not interfere. In the *Turner case, supra,* there were prescribed limits applicable to all. *S. ex rel. Nat. Oil Works of La. v. McShane, Mayor,* 159 La., ..., 106 Sou. Rep., 252.

S. v. Weddington, 188 N. C., 643, was a Sunday ordinance held valid, as follows: "That it shall be unlawful for any person or persons, merchants, tradesmen, or company to sell or offer for sale on Sunday any goods, wares, drinks or merchandise of any kind or character, except in case of sickness or absolute necessity, in the town of Faith." This is a different class of ordinance from the one under consideration. The Sunday ordinances are predicated on the idea that there should be a rest day for man. It is a police regulation necessary to the health and welfare of a people. The forbidding keeping open stores gives the rest and applies to all in the town alike. To the same effect is *S. v. Medlin,* 170 N. C., 682; *S. v. Davis,* 171 N. C., 809; *S. v. Burbage,* 172 N. C., 876; *S. v. Lumber Co.,* 186 N. C., 122.

"General Assembly or a municipal corporation has the power to classify the different occupations, provided the classification is not unreasonable and oppressive, and that usually the extent to which the power will be exercised is for the General Assembly or the governing body of the municipality." *S. v. Davis, supra.*

The principle is well stated in 19 R. C. L., p. 813, part sec. 118: "It is clear that an ordinance is passed by a municipal corporation which upon its face restricts the right of dominion which the individual might otherwise exercise without question, not according to any general or uniform rule, but so as to make the absolute enjoyment of his own depend upon the arbitrary will of the governing authorities of the town or city, it is unconstitutional and void, because it fails to furnish a uniform rule of action and leaves the right of property subject to the despotic will of the municipal officers, who may exercise it in accordance with some principle which it would not be within the constitutional power of the State to sanction or even so as to give exclusive profits and privileges to particular persons. There is, however, no valid objection to an ordinance which vests in a municipal board, or vests in a single officer, authority to grant permits or licenses to engage in an

occupation or commit an act which might well be forbidden altogether, but which under certain conditions and when in the hands of persons of good character may be harmless, when this is a reasonable method of dealing with the situation. The distinction is not always clear, and the cases are perhaps not wholly consistent," citing *S. v. Tennant, supra.*

We are not unmindful of the case of *S. v. Shannonhouse,* 166 N. C., 241, and cases therein referred to. In these cases, in pursuance of authority (or inherent power), the town specifically prescribed fire limits applicable to all alike. This case, cited with approval *S. v. Johnson,* 114 N. C., p. 848, which was written by *Mr. Justice Avery,* who wrote the *Tenant case.* In *S. v. Kirkpatrick,* 179 N. C., p. 747, the ordinances applied to all alike. There are exceptional cases where it is difficult or impracticable to lay down a definite comprehensive rule or the discretion relates to an administration of a police regulation and is necessary to protect the public morals, health, safety and general welfare, but in cases of this kind the exercise of discretion must not be unreasonable or arbitrary.

Interesting opinions, holding defendant's contention correct, are: *The State of Washington v. C. A. Fleming,* 129 Wash. Rep., p. 646; *Herring v. Stannus,* 169 Ark., p. 244, 275 S. W., p. 321.

There is no question as to the good faith of the mayor or board of aldermen of Goldsboro—men of character. The ordinances are far-reaching, and the law does not permit the enjoyment of one's property to depend upon the arbitrary or despotic will of officials, however well-meaning, or to restrict the individual's right of property or lawful business without a general or uniform rule applicable to all alike.

In this State, dealing in gasoline and oils is a legitimate business and so declared. Any valid ordinance must come under the time-honored rule of equal rights and not be dependent on arbitrary or despotic will. No ordinance is enforceable in matters of this kind, a lawful business, that does not make a general or uniform rule of equal rights to all and applicable to all alike—then there can be no special privilege or favoritism. The ordinance gives the power to the board of aldermen at their pleasure to grant one person a license and refuse another under the same circumstances. The cleavage and question is less troublesome when the distinction is observed between those things that are not harmful and unsafe and those that are. The right of individuals to engage in any lawful calling and use their property for lawful purposes is guaranteed to them, and any unreasonable restraint or oppressive exaction upon the use of property and utmost liberty of business growth and advancement is contrary to the fundamental law of the land.

In the case at bar we are dealing with property rights and a lawful business—not unsafe, according to the decisions of this Court. There

is a distinction between a case of this kind and a privilege or license to operate a poolroom, dance hall and such like, the ordinance operating equally upon a class or classes, which may affect the peace and good order of a municipality or county, or a privilege or license for a profession, trade or occupation under the police power, etc. But even in cases of this kind, where it is essential that power should be lodged in some governmental or municipal board or officer to withhold or revoke the license, the applicant for or revocation of license should be given notice and a hearing had and decision made according to their sound discretion and judgment. But action in these cases may be reviewed when it is shown that it has been palpably arbitrary or unjust. It is to be noted that the general State law, applicable to municipal corporations, has provided safety regulations applicable to all alike and the judgment of the court below requires conformity.

We do not think that the reference in the pleadings to the acts of the city planning commission of the city of Goldsboro enters into this controversy, although it may be noted that by a vote of two to one the commission recommended that the permit be granted.

The decisions are conflicting in other states, but the principle applicable in the present case, we think, is borne out by the decisions of the United States Supreme Court, in this State and a large majority in the other states of the Union, and founded on reason and justice.

For the reason given, the judgment of the court below is

Affirmed.

STACY, C. J., dissenting: The ordinances in question are assailed upon the ground that they provide no standard or uniform rule whereby the discretion vested in the board of aldermen, to issue or to withhold permits for the erection and operation of gasoline filling or gasoline storage stations in the city of Goldsboro, may be exercised according to some fixed regulation, known and established, and applicable to all alike. The attack was upheld by the trial court, and this is affirmed, for the reason stated, principally on authority of *S. v. Tenant*, 110 N. C., 609.

It is established by the clear weight of authority that an ordinance which lays down no general requirements to be followed and establishes no uniform rule, but merely prohibits the erection of any building within the corporate limits without a permit, is invalid, since it leaves the granting of a permit for any kind of a building to the arbitrary discretion of the municipal authorities, to be exercised according to their own will and subject to no review, which is regarded as an unwarranted use of the police power. 4 R. C. L., 395.

But, to my mind, the position is not sustained by the decision in *Tenant's case,* nor by the general rule of law announced therein. There, the court was dealing with an absolute prohibition against all owners of property within the city of Asheville from building or erecting anywhere in the city limits any house or building of any kind, or adding to or altering any house or building already constructed, without first obtaining permission so to do from the board of aldermen. The ordinance was declared invalid as an unwarranted interference with the ownership of property and its ordinary incidents. The board of aldermen was authorized to act, without valid reason had or assigned for its position, which was regarded as an unrestrained discretion, having no reasonable relation to the exercise of the police powers vested in the board for the well ordering of the city. Here the ordinances are much more restricted in their scope and operation. They apply to a single class of buildings, to wit, gasoline filling or gasoline storage stations, the regulation of which comes well within the police power of the State. *Storer v. Downey,* 215 Mass., 273. The permits are to be issued or withheld in the sound legal discretion of the board only after a hearing had at some regular meeting, a distinction fully recognized in *Yick Wo v. Hopkins,* 118 U. S., 356, and other cases cited by appellant. *Brunswick-Balke Co. v. Mecklenburg,* 181 N. C., 386.

Answering a like criticism leveled at an ordinance of the city of Durham, which prohibited the maintenance of a dance hall within the city limits for hire, "without first having obtained the consent of the board of aldermen," *Adams, J.,* speaking for the Court in *S. v. Vanhook,* 182 N. C., 831, said: "The counsel for the defendant contends that the ordinance confers upon the board of aldermen unlimited discretion in granting or refusing license, that it prescribes no uniform rule by which the board shall be guided, and that the aldermen consequently pass upon each application according 'to their own pleasure.' But the board is not clothed with arbitrary or unlimited discretion. Whether a license shall be granted upon application is a matter within the limited legal discretion of the board. It is true that in the absence of abuse such discretion cannot be controlled by the courts, but the ordinance is not for that reason void. *Brodnax v. Groom,* 64 N. C., 244; *Key v. Board of Education,* 170 N. C., 125. Of course uniformity of operation upon all alike is essential, but this requirement is met by the express language of the ordinance."

The decisions hold that the validity of the grant of discretion depends largely upon the nature of the business or thing with respect to which it is to be exercised, and as to whether or not its proper regulation and control require a discretion to be vested in one or more public officials

for the orderly control of the business, or the use of the article or thing in question. Note, 12 A. L. R., 1435.

A gasoline filling or gasoline storage station may not be a nuisance *per se*, but it may become such, like a hospital *(Lawrence v. Nissen*, 173 N. C., 359), a livery stable *(S. v. Bass*, 171 N. C., 781), a dance hall *(S. v. Vanhook*, 182 N. C., 831), a sawmill *(Barger v. Smith*, 156 N. C., 323), or a poolroom *(Brunswick-Balke Co. v. Mecklenburg*, 181 N. C., 386), because of its location or by reason of the manner in which it is conducted. Oil and gasoline, invariably used and stored in such stations, are so highly inflammable and explosive that they may, and do, increase the danger to fire, no matter how carefully the buildings are constructed or how noncombustible their materials. And although lawful and necessary buildings, they are of such character that regulation of the place of their erection and use comes well within settled principles relating to the exercise of the police power. "The State is not bound to wait until contagion is communicated from a hospital established in the heart of a city; it may prohibit the establishment of such hospital there, because it is likely to spread contagion. So the keeping of dangerous explosives and inflammable substances, and the erection of buildings of combustible materials within the limits of a dense population may be prohibited because of the probability or possibility of public injury." *Walker, J.*, in *Durham v. Cotton Mills*, 141 N. C., p. 636.

Furthermore, the trend of judicial decision is to the effect that it is not always necessary for a statute, or ordinance, to prescribe a specific rule of action. It is well recognized that many statutes call for the vesting of some discretion in public officials, because of the difficulty or impracticability of laying down a definite and comprehensive rule which will afford at once an adequate protection for the public as well as for the individual citizen. *S. v. Yopp*, 97 N. C., 477.

It is fully recognized that the right of classification is "referred very largely to the legislative discretion, and its exercise may not be interfered with by the courts unless the same is clearly arbitrary." *S. v. Stokes*, 181 N. C., 539; *S. v. Burnett*, 179 N. C., 735.

Speaking to the question in *City of Des Moines v. Manhattan Oil Co.*, 193 Iowa, 1096, *Weaver, J.*, says: "With the changing conditions necessarily attendant upon the growth and density of population, and the ceaseless changes taking place in method and manner of carrying on the multiplying lines of human industry, the demand becomes greater upon that reserve element of sovereignty which we call the police power, for such reasonable supervision and regulation as the State may impose, to insure observance by the individual citizen of the

duty to use his property and exercise his rights and privileges with due regard to the personal and property rights and privileges of others (citing authorities). Such duty, even though it involves restriction upon the so-called natural rights of every individual, is the first and most imperative obligation entering into what we call the social compact. Without it there can be no such thing as organized society or civilized government. Naturally, what regulations may reasonably be required or imposed for that purpose by the constituted authorities vary with the varying conditions with which our lawmakers have to deal; and, subject only to constitutional limitations, the State, acting by its Legislature, has the right to select the subjects of regulation and to prescribe rules for making such regulations effective. To justify the exercise of such authority, it is not necessary that the subject thereof shall be inherently wrong; nor is the fact that such regulation may operate to restrict the individual citizen in the use of his own property, or even in his liberty, of itself sufficient to render the regulation or restriction void (citing authorities).

"The power to designate the subject of police regulation rests in the State alone; and if a given statute is not clearly repugnant to some constitutional guaranty, the courts are without power to interfere. Such interference, if tolerated at all, must be on the theory that the subject of the regulation is not within the legislative jurisdiction; or, if the subject be one within such jurisdiction, it must appear to the Court that, looking through mere forms, and at the substance of the matter, it can say that the statute, enacted professedly in the interest of the public or general welfare, 'has no substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law' (citing authorities). The Legislature, acting within these limits, is the sole judge as to all matters pertaining to the public policy, wisdom, and expediency of the police regulations which it prescribes (*S. v. Armour Pkg. Co.,* 124 Iowa, 323, 12 Corpus Juris, 932); and while the police power is familiarly exercised in regulations to promote the public health and morals, it extends as well to the promotion of 'public convenience and general prosperity.' *Chicago, B. & O. R. Co. v. People of Ill.,* 200 U. S., 561."

In *S. v. Fleming,* 129 Wash., 646, 225 Pac., 647, 34 A. L. R., 500, it was held that an ordinance vesting in the city council of Spokane the discretion to grant or deny, after public hearing, permits for gasoline filling stations, outside the fire limits of the city, as the public interest might require, was not invalid as vesting an arbitrary discretion in the council. This position is fully supported, in tendency at least, by the decisions in *Fischer v. St. Louis,* 194 U. S., 361, and *New York ex rel.*

Lieberman v. Van DeCarr, 199 U. S., 552, where the subject is discussed at considerable length.

In the case last cited the Court had under consideration a section of the sanitary code of New York, which provided that "no milk shall be received, held, kept, either for sale or delivered in the city of New York, without a permit in writing from the board of health, and subject to the conditions thereof." One objection to this provision was that it put absolute power in the hands of the board of health to grant or withhold permits to milk dealers, and therefore violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. In the course of an elaborate opinion sustaining the validity of the ordinance, *Mr. Justice Day,* speaking for the Court, said:

"In *Davis v. Massachusetts,* 167 U. S., 43, an ordinance of the city of Boston providing that no person shall make any public address in or upon the public grounds, except in accordance with a permit from the mayor, was held not in conflict with the Fourteenth Amendment to the Constitution of the United States. In *Wilson v. Eureka City,* 173 U. S., 32, an ordinance requiring persons to obtain written permission from the mayor or president of the city council, or in their absence a councillor, before moving a building upon any of the public streets of the city, was sustained as not violative of the Federal Constitution. In the opinion of the Court a number of instances were given in which acts were prohibited except with the consent of an administrative board, and which were sustained as proper exercises of the police power. In *Gundling v. Chicago,* 177 U. S., 183, an ordinance was sustained permitting the mayor to license persons to deal in cigarettes when he was satisfied that the person applying for the license was of good character and reputation and a suitable person to be intrusted with their sale. And in the recent case of *Jacobson v. Massachusetts,* 197 U. S., 11, this Court sustained a compulsory vaccination law which delegated to the boards of health of cities or towns the determination of the necessity of requiring the inhabitants to submit to compulsory vaccination. And in *Fischer v. St. Louis,* 194 U. S., 361, an ordinance of the city of St. Louis providing that no dairy or cow stable should thereafter be built or established within the limits of the city, and no such stable not in existence at the time of the passage of the ordinance should be maintained on any premises, unless permission should have been first obtained from the municipal assembly by ordinance, was sustained as a proper exercise of the police power. After sustaining the right to vest in a board of men acquainted with the local conditions of the business to be carried on, power to grant or withhold permits, this Court said:

"'It has been held in some of the state courts to be contrary to the spirit of American institutions to vest this dispensing power in the hands of a single individual, *Chicago v. Trotter,* 136 Ill., 430; *Matter of Frazee,* 63 Mich., 396; *S. v. Fisk,* 9 R. I., 94; *Baltimore v. Radecke,* 49 Md., 217; *Sioux Falls v. Kirby,* 6 S. Dak., 62, and in others that such authority cannot be delegated to the adjoining lot owners. *St. Louis v. Russell,* 116 Mo., 248; *Ex parte Sing Lee,* 96 Cal., 354. But the authority to delegate that discretion to a board appointed for that purpose is sustained by the great weight of authority, *Quincy v. Kennard,* 151 Mass., 563; *Commonwealth v. Davis,* 162 Mass., 510, and by this Court the delegation of such power, even to a single individual, was sustained in *Wilson v. Eureka City,* 173 U. S., 32, and *Gundling v. Chicago,* 177 U. S., 183.'

"These cases leave in no doubt the proposition that the conferring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business which is the proper subject of regulation within the police power of the state is not violative of rights secured by the Fourteenth Amendment."

For the reasons stated, I am impelled to dissent from the decision of the majority. I think the ordinances in question are valid.

LAURA S. BIZZELL v. BOARD OF ALDERMEN OF CITY OF GOLDSBORO ET AL.

(Filed 20 October, 1926.)

Municipal Corporations—Cities and Towns—Ordinances—Constitutional Law—Zoning Districts—Statutes.

Under the provisions of the Zoning Statute, 3 C. S., 2776(s), (Laws of 1923, ch. 250, sec. 2), the regulations prescribed shall be uniform for each class or kind of building throughout each district, and the regulations of one district may differ from those of the others, and can have no application to the question of the rights of the governmental body of the city refusing to issue a permit for a gasoline filling station, in denial of the right of an applicant for such license under an invalid ordinance.

STACY, C. J., dissenting.

APPEAL by defendants from *Sinclair, J.,* WAYNE Superior Court, from order at Chambers, April, 1926. Affirmed.

Hugh Dortch and Dickinson & Freeman for plaintiff.
D. C. Humphrey and Kenneth C. Royall for defendants.

CLARKSON, J. In *Eleanor Bizzell v. Board of Aldermen, ante,* 348, we said: "We do not think that the reference in the pleadings to the acts of the city planning commission of the city of Goldsboro enters into this controversy, although it may be noted that by a vote of two to one the commission recommended that the permit be granted."

In the present case the city planning commission, by a vote of two to one recommended that the permit be not granted. We think this case presents practically the same questions presented in the *Eleanor Bizzell case, supra.*

At the Special Session 1921 (Public-Local Laws, ch. 169), was passed: "An act providing for the establishment of planning commissions in the cities and towns of North Carolina, and prescribing the powers and duties of such commission." This act applied to counties of Buncombe and New Hanover and made applicable to Wayne. Ch. 343, Public-Local Laws 1925.

At the General Session 1923 (Public Laws, ch. 250) was passed: "An act to empower cities and towns to adopt zoning regulations."

3 C. S., ch. 56, Art. 11(c), Zoning Regulations.

The ordinance of the board of aldermen of the city of Goldsboro of 19 October, 1925, creating the city planning commission for the city of Goldsboro (under authority of the legislative acts, *supra,* expressly limits its power to the consideration and supervision of new subdivisions of property which might be opened within the city of Goldsboro or within a mile of its limits. No districts or zones have been established or regulations made. In fact, defendants say in their brief: "At the time of this application and at the time it was denied by the board of aldermen, the planning commission was working on a plan for districting and zoning the city, but had not completed its plan or made any report thereon."

The laws regulating zoning and districting under legislative authority in the above recited acts were not carried out—no notice, public hearing, etc., as required (Laws 1921, secs. 4-10; Laws 1923, sec. 4), and have no application in the present action.

In fact the zoning regulations, 3 C. S., latter part of 2776(s) (1923, ch. 250, sec. 2), says: *"All such regulations shall be uniform for each class or kind of building throughout each district, but the regulations in one district may differ from those in other districts."*

For the reasons given, the judgment of the court below is

Affirmed.

STACY, C. J., dissenting.

THE CORPORATION COMMISSION OF NORTH CAROLINA v. FARMERS AND MERCHANTS BANK OF HENDERSON ET AL.

(Filed 20 October, 1926.)

1. Appeal and Error—Case—Settlement by Trial Judge.

When the judge who has presided at the trial is duly called upon to settle a case on appeal, it is not required that he conform in whole or in part to either of the statements submitted to him by the parties to the action, or settle differences between them in relation thereto, and he may disregard both statements.

2. Banks and Banking — Receivers — Shareholders — Assessments — Statutes.

The liability of a stockholder of a bank to the corporation in addition to the par value he has paid, is contractual, C. S., 237, and the amount of his liability when the bank has become insolvent and in the hands of a receiver, is determinable in the original action brought for the liquidation of the bank and the issuance of summons duly served under order of court. C. S., 239.

3. Same—Payment—Discharge of Liability—Costs.

Where the assets of an insolvent bank in a receiver's hands are insufficient, and assessment among the individual stockholders becomes necessary, each shareholder is entitled to have the amount he is chargeable with lawfully determined, and when this has been done, he may pay it and be discharged from further liability without incurring costs in the proceedings. The question as to whether the costs may be in proper instances apportioned by the court, as in suits in equity, does not arise in this case.

4. Same—Actions.

Where the assessments have been duly made under our statutes against the individual stockholders of an insolvent bank in the proceedings for liquidation, the receiver under the order of court may institute an independent action against the shareholders in default for its payment, and if successful the costs of this action are taxable against such stockholders, but not those incurred in the original proceeding under the provisions of C. S., 240.

5. Same—Opportunity to be Heard.

Where the individual stockholders have been made parties to liquidate the bank by which the shares had been issued, they must be afforded an opportunity to be heard before assessments are made in order that they be thereafter precluded from contesting the amount.

6. Same—Issues—Trial by Jury—Reference—Statutes.

Before the stockholders of an insolvent bank can be individually assessed for the payment of its debts, etc., the amount of the assets and liabilities must first be determined, and when an issue is raised by denial of the receiver's allegation or statement thereof in the original suit for dissolution, an issue of fact is raised for the determination of the jury, or by reference under the provisions of C. S., 573(1), (2).

APPEAL by individual defendants from judgment of *Cranmer, J.*, at June Term, 1926, of VANCE. Reversed.

This action, begun on 29 April, 1924, by the Corporation Commission of North Carolina against Farmers and Merchants Bank of Henderson, for the involuntary liquidation of said bank, upon the allegation that it was then insolvent, has been since, and is now, pending in the Superior Court of Vance County.

At March Term, 1926, upon its findings of fact, that said bank is insolvent; that all its assets in the hands of the receiver, theretofore appointed, are not sufficient to pay the claims of depositors and other creditors; and that its stockholders are liable to an assessment to the amount of the par value of its capital stock, to wit, $125,000, each stockholder being liable for the full amount of the par value of stock owned by him, it was, upon motion of the receiver, ordered by the court that the receiver be directed to assess and collect from each stockholder a sum of money equal to the par value of his stock, and that said receiver institute an action against each of said stockholders who fail to pay such sum to recover judgment for same. None of the stockholders were parties to the action at the time this order was made.

Thereafter, summons having been issued in this action and duly served upon each of the individual defendants, returnable on 29 March, 1926, the receiver filed his petition and complaint against each of said defendants. In said petition it is alleged that said defendants were stockholders in the Farmers and Merchants Bank, at the date of the appointment of the receiver; that it has been adjudged by the Superior Court of Vance County that said bank was then and that it is now insolvent; that the receiver has attempted to collect and reduce to cash the assets of said bank; that it has ascertained that the liabilities of said bank exceed the sum of $442,606.69; that its assets do not exceed in value the sum of $300,000; that its liabilities to depositors and other creditors exceed the value of its assets by more than $125,000, the amount of its capital stock; that in order to pay off and discharge the deficiency remaining after the application of all the assets as payments thereon, it will be necessary to enforce the individual liability of each stockholder to the full amount of the par value of his stock; and that pursuant to an order, made in this action, summons and notice, as directed therein, had been duly served upon each of the stockholders. The receiver prays that an assessment as directed by the court be made upon each defendant and that he recover judgment for the amount of such assessment.

Each defendant, in his answer to the petition and in response to the notice to show cause, denied liability for the assessment as prayed for by the receiver, and alleged that the value of the assets in the hands of

the receiver, not yet administered by him, exceed by $100,000 their value as reported to the court; that assets consisting of land and securities of considerable value have not been sold or collected, but are still in the possession of the receiver and under his control; each defendant demands that all said assets be fully administered before any assessment is made upon stockholders to enforce their individual liability.

At June Term, 1926, after the answers of the defendants had been filed, upon findings by the court that the Farmers and Merchants Bank is insolvent and that the debts of said bank exceed its assets in the hands of the receiver, by more than $125,000, its capital stock, judgments were rendered against each defendant that the receiver recover of him a sum equal to the full par value of his stock, together with all his costs to be taxed by the clerk of the court. From these judgments defendants appealed to the Supreme Court.

J. P. & J. H. Zollicoffer, Perry & Kittrell and T. S. Kittrell for plaintiff.

A. A. Bunn, Thomas M. Pittman for defendants.

CONNOR, J. Upon failure of counsel to agree thereon, the judge settled the case on appeal, as required by statute, C. S., 644. Defendant's exception to statement in case on appeal, being a brief summary of facts appearing on the record in this action, cannot be sustained. The judge included such statement in the case on appeal, as settled by him, doubtless, because the entire record was not sent to this Court, it being necessary to print only a part of said record in order to present to the Supreme Court the matters involved in this appeal. When counsel fail to agree upon a statement of the case on appeal, and the judge is requested by counsel for appellant to settle the case, as provided by statute, the judge does not merely adjust the differences between counsel. He may disregard both the case on appeal and the countercase, as prepared by counsel. *Slocumb v. Construction Co.*, 142 N. C., 353. It does not appear that counsel for defendants made known to the judge their objection to the statement included by him in the case on appeal; defendants are not prejudiced on their appeal by the facts contained in the statement, and their assignment of error, based upon their exception thereto, cannot be sustained.

In the judgment rendered against each defendant, it is ordered and adjudged not only that the receiver recover of the defendant an amount equal to the par value of his stock, but also that he recover "all his costs to be taxed by the clerk." Each defendant excepts to the judgment against him for costs, contending that there is no provision in the statute for recovery by the receiver of costs incurred in determining the

amount required to be assessed against stockholders as provided in C. S., 239, and that in no event is each stockholder liable for all the costs of the action in which the assessment is made. The assignment of error based upon this exception must be sustained.

The liability of stockholders of a bank, organized under the laws of this State, by virtue of C. S., 237, is contractual. *Smathers v. Bank,* 135 N. C., 410. It is provided by C. S., 239, that the amount for which each stockholder is liable, and for which he shall be assessed, shall be determined in the original action, brought for the liquidation of the bank, after the stockholders have been made parties defendant thereto. *Trust Co. v. Leggett,* 191 N. C., 362. The amount of each stockholder's indebtedness cannot be determined by an assessment in the original action until the stockholders have been made defendants therein. When the assessment has thus been made, but not before, each stockholder may pay the amount of his indebtedness, as determined thereby and thus discharge his liability on account of the assessment. The assessment in the original action is a condition precedent to the recovery of judgment by the receiver for the amount of such indebtedness in an action against the stockholder. The costs incurred in determining the amounts due by the stockholders, on account of their individual liability cannot be taxed against the stockholders, as a matter of law; such costs are, ordinarily, part of the expenses of administering the estate of the insolvent bank; whether or not the proceeding, although authorized by statute, being equitable in its nature, the court may apportion the costs between the receiver and the stockholders in its discretion, is not presented upon this record.

If a stockholder, who was a party defendant to the original action, when the assessment was made, fails to pay the receiver, upon his demand, the amount assessed against him, the receiver may institute an action against the defaulting stockholder to recover the amount of his indebtedness, by virtue of the assessment; if the receiver recovers judgment in this action, he is entitled to his costs in the action in which the judgment is rendered, but not, of course, to the costs incurred in the original action in which the assessment was made. C. S., 240.

Defendants excepted to the judgment rendered at June Term, 1926, upon the pleadings, contending that issues of fact were raised by their answers to the petition and complaint of the receiver, upon which they were entitled to a trial. C. S., 239, provides that before an assessment shall be made upon stockholders of an insolvent bank, because of their liability under C. S., 237, an accounting may be had, in the original action, to which the stockholders shall have been made parties defendant, manifestly for the purpose of affording stockholders an opportunity to be heard, before assessments are made, and in order that, hav-

ing had such opportunity, they shall be precluded thereafter from contesting the assessments. *Trust Co. v. Leggett,* 191 N. C., 362. Where the total amount of the liabilities of the bank and the total value of the assets available for the purpose of discharging such liabilties are not admitted, but on the contrary, it is alleged by the stockholders, in their answers to the petition and complaint, and to the order to show cause, served upon them, as in the instant case, that the true value of the assets exceed the value as reported to the court by the receiver, who has not reduced the assets to cash, by a sum sufficient to greatly reduce the amount which the receivers allege should be assessed, it is error to render judgment determining the amount of the assessment as prayed for by the receiver, without an accounting as provided by statute.

Assessments cannot be made, under the statute, until it has been adjudged, upon the facts found, that a deficiency exists, and until the amount thereof has been determined. The amount of the deficiency cannot be determined until the sum which the receiver will, at least probably, receive from the sale and collection of the assets of the insolvent bank has been found—there being no denial, as in the instant case—that the amount of the liabilities are as alleged by the receiver. In *Smathers v. Bank,* 135 N. C., 410, decided at Spring Term, 1904, it was held that a contention that no assessment can be made until the assets are completely exhausted, could not be sustained; it is said, however, in the opinion in that case, that the extent of the stockholder's liability cannot be absolutely fixed until the status of the assets and liabilities has been ascertained. The decision in *Smathers v. Bank* is not an authority for the contention now made that the amount of the stockholder's indebtedness to the receiver, under C. S., 237, may be adjudged, without a finding, as to the value of the assets in the hands of the receiver, and not yet reduced to cash. Since the decision in *Smathers v. Bank,* the statute—C. S., 239—has been enacted. By its express terms, the amount of the deficiency between the liabilities and the assets shall be determined before assessments are made upon stockholders, in order to enforce their liability. For this purpose an accounting may be had in the original action, after the stockholders have been made parties defendant. An allegation as to the value of the assets in his hands by the receiver, denied by the stockholders in their answers, raises an issue of fact upon which stockholders are entitled to a trial by jury. Their right to such trial has not been waived. The amount of their indebtedness cannot be adjudged until this issue has been determined. *Jordan v. Farthing,* 117 N. C., 181; *Carr v. Askew,* 94 N. C., 194; *Ely v. Early,* 94 N. C., 1. It is necessary to find the fact involved in the issue in order that the accounting may be had.

Defendants' assignment of error for that the judgment was rendered upon the pleadings, without a trial of the issue raised by the answer, must be sustained. The judgment is reversed. The trial may be by reference; if the parties do not consent to a reference, the judge may order a compulsory reference, as provided by C. S., 573, sections 1 and 2. If a compulsory reference is ordered, the parties may preserve their right to trial by jury, as provided by statute, and in accordance with the practice approved by this Court. *Lumber Co. v. Pemberton,* 188 N. C., 532, and cases there cited. The judgment is

Reversed.

HARDISON ET ALS. v. EVERETT.

(Filed 20 October, 1926.)

1. Estoppel—Actions—Judgments—Agreement of Parties—Issues.

Estoppel by a former judgment may be successfully interposed as a defense to an action between the same parties and their privies, upon the same subject-matter of litigation, and upon the same issues, and upon any question upon which the parties to the former action may have agreed that should be embraced within the issues determined and properly appearing in the records of the former trial in which the judgment was rendered.

2. Same—Title—Record in Former Action—Privies—Successor in Title.

Where the parties to an action have agreed that a certain lot of land shall be determined by the answer to the issues involving the true dividing line between adjoining owners, the judgment therein rendered may not successfully be set up as an estoppel between the successor in title of a party to the former action, when by reference to the former record it appears that the present controversy involves title to lands not embraced in the agreement of the parties to the former action.

CIVIL ACTION, before *Bond, J.,* at April Term, 1926, of ONSLOW.

The plaintiff brought suit against the defendant, alleging that he was the owner of a tract of land containing about three hundred acres, and that the defendant had trespassed thereupon. The defendant answered denying plaintiffs' title.

There was evidence tending to show that on 20 April, 1922, V. Sidbury sold to the plaintiff two acres of land designated in the record as the Craig place. Sidbury purchased these two acres from one Justice in 1913, and was therefore the owner of the land in 1915. The two-acre Craig lot was located at the northeastern corner of tract No. 2 of the Ennett land. At the April Term, 1915, V. Sidbury brought a

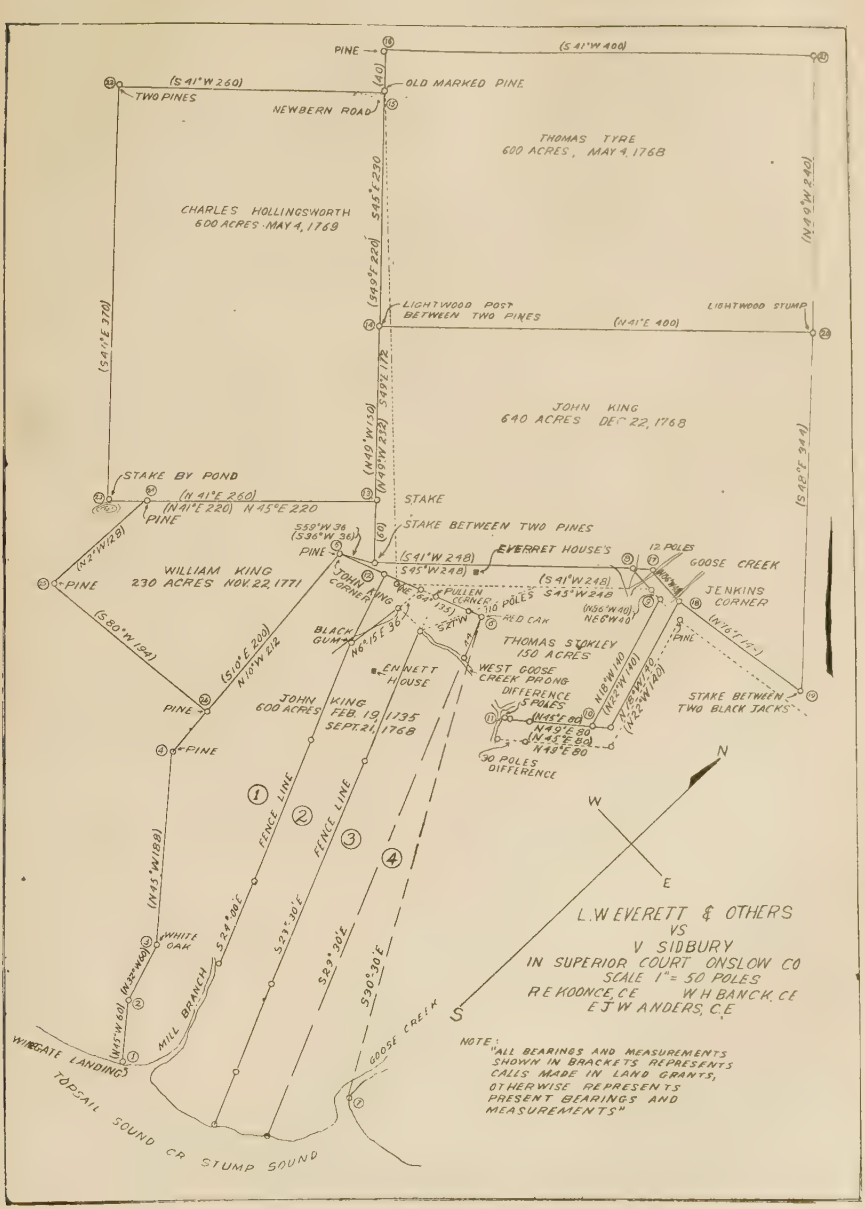
suit against L. W. Everett, the defendant in this case, and others, claiming to be the owner of a tract of land containing about 500 acres. In the complaint filed in said action in 1915 the description of the land referred to J. W. Hardison's corner and L. W. Everett's line. In the suit between Sidbury and Everett in 1915, the plaintiff, Sidbury, was claiming land north of "West Goose Creek Prong," and in the present case, the "Craig place" is north of West Goose Creek Prong. At the April Term, 1916, in the case of *Sidbury v. Everett,* the following issue was submitted to the jury: "Is the true dividing line between the land of the plaintiff, Sidbury, claimed under John King 600-acre grant and the land of the defendant, Everett, the line from the point marked 'Pullen corner' on the map attached, to the point marked 'red oak at 6?' The jury answered this issue, no. Whereupon, at the April Term, 1916, the following judgment was rendered:

This cause coming on to be heard, it having been agreed and put in the record that the whole controversy hinges on where is the dividing line between the plaintiff, V. Sidbury, and the defendant, owner, and the other defendants claiming certain timber rights on the lands of said Everett, and it having been further agreed by both sides that if the jury find that the true dividing line between the tract of land owned by the plaintiff, and the tract of land owned by the defendants according to their respective interests, was not the line on the map marked Pullen corner, running to point 6 marked red oak, then the true dividing line between the lands of said parties is the West Goose Creek Prong, as shown on said map from letter Y to the letter X, and the jury having answered the issue saying that the line first named is not the true dividing line, it is adjudged, ordered and decreed that the defendant, L. W. Everett, subject to such rights in the timber as his codefendants may have, is the owner and rightfully in possession of the land in controversy, bounded south by the West Goose Creek Prong, running from letter Y to the letter X on map hereto attached and made a part of this judgment.

It is further ordered, adjudged and decreed that the plaintiff, V. Sidbury, is the owner of lot No. 3 in the division of the Thomas Ennett lands, and that its northern boundary is the West Goose Creek Prong from Y to X."

The complaint, issues and judgment in the case of *Sidbury v. Everett,* rendered in 1916, are pleaded by the defendant Everett, in the present suit of *Hardison v. Everett,* as an estoppel by judgment. The trial judge was of the opinion that the plaintiff Hardison was estopped by the record and judgment in the case of *Sidbury v. Everett,* from which judgment the plaintiff appealed.

HARDISON *v.* EVERETT.



D. L. Ward and Nere E. Day for plaintiffs.
E. W. Summersill and L. R. Varser for defendant.

BROGDEN, J. The defendant asserts that, as V. Sidbury was the owner of the "Craig place" when the judgment was rendered in 1916, between Sidbury and Everett, Hardison, being the purchaser of the "Craig place" in controversy from Sidbury, since said judgment, is estopped by the judgment from claiming the land in controversy. The plaintiff asserts that the record in *Sidbury v. Everett,* and the judgment in that cause, determined the northern boundary of Sidbury, as to lot No. 3 only, and did not involve title to lot No. 2, which is now in dispute.

Estoppel by judgment is thus defined by *Pearson, J.,* in *Armfield v. Moore,* 44 N. C., 157: "The meaning of which (estoppel) is, that when a fact has been agreed on, or decided in a court of record, neither of the parties shall be allowed to call it in question, and have it tried over again at any time thereafter, so long as the judgment or decree stands unreversed. . . . In other words, his mouth is shut, and he shall not say that is not true which he had before in a solemn manner asserted to be truth." The underlying reason for recognizing the principle of estoppel is that a person ought not to be vexed twice about the same matter.

Estoppel by judgment arises from the following essentials: (1) Identity of parties; (2) identity of subject-matter; (3) identity of issues. *Wagon Co. v. Byrd,* 119 N. C., 460; *Tyler v. Capehart,* 125 N. C., 64; *Gillam v. Edmonson,* 154 N. C., 127; *Coletrain v. Laughlin,* 157 N. C., 287; *Clarke v. Aldridge,* 162 N. C., 326; *Whitaker v. Garren,* 167 N. C., 658; *Price v. Edwards,* 178 N. C., 493.

It is also fully established that estoppels by judgment bind both parties and privies. *Price v. Edwards,* 178 N. C., 493; *Rogers v. Ratcliff,* 48 N. C., 225.

There is evidence tending to show that the two-acre Craig place, although north of "West Goose Creek Prong," is included in the boundaries of lot No. 2 claimed by Hardison, and was never a part of lot No. 3 of the Ennett land. There is, therefore, lack of identity of subject-matter.

The judgment in *Sidbury v. Everett,* rendered in 1916, enlarges the scope of that case, because it was agreed between the parties that if the dividing line between the litigants, as the jury found, was not the line marked Pullen corner to red oak at 6, "that the true dividing line between the lands of said parties is West Goose Creek Prong, as shown on said map from letter Y to letter X." However, it appears from the map that the line from the letter Y to the letter X establishes only the

northern boundary line of lot No. 3 of the Ennett lands; whereas, this cause, now under consideration, involves the title to lot No. 2 of the Ennett lands and the "Craig place" is within the boundaries of lot No. 2.

The judgment in the *Sidbury case* provides "that the plaintiff, V. Sidbury, is the owner of lot No. 3 in the division of the Thomas Ennett land, and that its northern boundary is the West Goose Creek Prong from Y to X." This clause of the judgment in the *Sidbury case* confines and interprets the complaint, the issue, and the judgment, as relating only to lot No. 3 of the Ennett lands and fixes the northern boundary of said lot No. 3 at the West Goose Creek Prong.

Therefore, the judgment, relied upon as an estoppel, having restricted the scope of the proceeding to a fixed area, to wit, lot No. 3 of the Ennett lands, and it appearing from the evidence that the land in controversy in this action is outside of the area designated as lot No. 3, the principle of estoppel does not apply.

Reversed.

G. H. JORDAN, ADMINISTRATOR, v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 20 October, 1926.)

1. Negligence—Evidence—Attractive Nuisance.

In the absence of evidence tending to show that a child was not injured at the place of an "attractive nuisance" alleged to have caused the injury in suit, it was insufficient to be submitted to the jury.

2. Evidence—Conjecture.

Evidence is insufficient to take the case to the jury which merely raises a conjecture or suspicion.

CIVIL ACTION, tried before *Barnhill, J.*, and a jury, at April Term, 1926, of WAKE.

This action was instituted to recover damages for the wrongful death of plaintiff's intestate, James Jordan, who was a bright boy of the age of five and a half years. At the conclusion of all the testimony judgment of nonsuit was entered and the plaintiff appealed.

Douglass & Douglass for plaintiff.
Murray Allen for defendant.

PER CURIAM. The complaint specifies four elements of negligence, to wit: First, that the defendant, for several years, had permitted children to play on or near the main line, at Cary, at a place where the

signal pipes were located; second, that the defendant did not stop its train or reduce its speed so as to prevent the killing of the child; third, that the defendant's employees in charge of the train did not keep a proper lookout; fourth, that the defendant failed to remove the child from the track or warn or notify the parents of the danger.

Upon a careful examination and scrutiny of the entire testimony the Court is of the opinion that there was no evidence of negligence warranting submission of the case to the jury. All the evidence was to the effect that the child was not injured at the pipes or while on the pipes, but at least a car-length from the pipes. So that, if the pipes had constituted an "attraction to small children," the plaintiff's intestate was not injured on the pipes or by reason of the existence or location thereof.

The plaintiff relies upon the cases of *Powell v. R. R.*, 125 N. C., 370, and *Whitesides v. R. R.*, 128 N. C., 229. In both of these cases there was evidence that the injured party was on the track at the time of receiving the injury complained of. In the *Whitesides case* the defendant admitted in its answer that the plaintiff was injured on the trestle.

There is no evidence in this record that the child was on the track at the time the train passed. There was no physical evidence on or about the engine showing that the child had been struck by it, and the last time the child was seen before the injury shows "he had moved" and "was standing along by the edge of the ballast line, five feet from the rail."

The evidence, viewed in its most favorable light to plaintiff, creates no more than a suspicion, or conjecture, which is not sufficient to warrant a submission of the question to a jury. *Brown v. Kinsey,* 81 N. C., 245; *Seagrove v. Winston,* 167 N. C., 207; *S. v. Prince,* 182 N. C., 790; *S. v. Martin,* 191 N. C., 404. The judment as rendered is Affirmed.

R. N. MITCHELL, ADMINISTRATOR, v. HAROLD ATKINS.

(Filed 20 October, 1926.)

Evidence—Negligence—Automobiles—Collisions.

Where involved in the issue of negligence, the question arises as to the position upon the highway of plaintiff's and defendant's automobiles at the time of a collision, it is competent for a witness to testify where he saw them immediately after the occurrence, when there is further evidence that their position had not been since changed.

APPEAL by defendant from *Calvert, J.,* at February Term, 1926, of FRANKLIN. No error.

The death of plaintiff's intestate was caused by injuries received by him in a collision, at a curve on the highway between Raleigh and Wake Forest, between a Ford coupe, which he was driving, and a bus, owned by defendant and operated for him by his employee, in the transportation of passengers. The jury answered the issues in accordance with the contentions of plaintiff, and assessed his damages at $10,000. From judgment upon the verdict, defendant appealed to the Supreme Court.

W. H. Yarborough, Ben T. Holden, and Biggs & Broughton for plaintiff.

Mills & Mills and Winston, Winston & Brassfield for defendant.

PER CURIAM. Defendant's objections at the trial to testimony of witnesses as to the conditions observed by them, upon their arrival at the scene of the wreck, soon after the collision, were properly overruled. This testimony was competent; there was evidence that neither the automobile nor the bus had been moved between the time of the collision and the arrival of the witnesses upon the scene. Their relative positions on the roadside, after the collision, was evidence as to the manner in which the Ford coupe and the bus were being operated immediately before the collision. Plaintiff alleged that the driver of the bus was negligent in that he was operating the bus on the left side of the highway at an excessive rate of speed, and that this negligence was the proximate cause of the injury. There was evidence to sustain this allegation. There was no error in refusing defendant's motion for judgment as of nonsuit. There was sharp conflict in the evidence upon both the issues as to negligence and to contributory negligence. His Honor properly submitted both issues to the jury. There are no exceptions to his charge. The judgment must be affirmed, the trial having been had without error of law. The judgment is affirmed. There is

No error.

NORTH CAROLINA LUMBER COMPANY v. SPEAR MOTOR COMPANY ET AL.

(Filed 27 October, 1926.)

1. Contracts—Written Contracts—Interpretation—Questions of Law—Independent Contractors—Principal and Agent.

The question as to whether a building is altered and repaired by one acting as an independent contractor, or as the agent for the owner, to be compensated by a percentage of the cost of the work, is one of law, when the full terms of such employment are stated in a written contract unambiguously expressed.

2. Same—Respondeat Superior—Materialmen.

Under a contract to remodel or repair a building for the owner upon a compensatory percentage based upon the cost, the owner to pay for all materials used upon statements rendered, and to retain supervision or control of the work as it progressed, the relationship of principal and agent is established, and not that of independent contractor, and the owner is directly responsible to those furnishing the materials in contemplation of the contract.

3. Mechanics' Liens—Principal and Agent—Materialmen.

Where one has furnished the owner at the request of the contractor, materials to be used in his building, and by the terms of the written contract, the contractor is the agent of the owner for that purpose, the one so furnishing the material may acquire and enforce his lien upon the building, under the provisions of C. S., 2433, 2469, 2470.

4. Principal and Agent—Undisclosed Principal—Respondeat Superior.

A materialman who has furnished to the agent of the owner material for the construction or repair of his building may hold the owner liable for the purchase price as an undisclosed principal, and enforce his lien upon afterwards discovering this relationship.

5. Election of Remedies—Principal and Agent—Undisclosed Principal—Judgment by Default Against Agent—Pleadings—Issues—Independent Contractor.

Where a material furnisher for a building has sued the owner as an undisclosed principal as well as his agent who purchased the material, and judgment by default in his favor has been taken against the agent, he is not thereby barred of his right of recovery against the principal, under the doctrine of election of remedies, to prosecute his action to final judgment against the principal, the cause having for this purpose been retained and proceeded with under the principal's denial of the agency, but setting up the defense of independent contractor.

APPEAL by plaintiff from *Bond, J.*, at June Term, 1926, of LENOIR. New trial.

Action to recover purchase price of lumber sold by plaintiff and used in remodeling building on lot owned by defendant, Spear Motor Company, in Kinston, N. C.

On 17 June, 1924, Spear Motor Company employed R. L. Blalock & Son to remodel its building, under a written contract, the material portions of which are as follows:

"The contractor shall order all materials, furnish all construction equipment and sufficient skilled and common labor force which may be necessary to properly remodel or rebuild the property tenanted by the Spear Motor Company, Kinston, N. C., in accordance with such plans and specific instructions as may be furnished by the owner.

"And for and in consideration of the duties, as stated above to be performed by the contractor, the owner shall pay to the contractor in legal tender of the United States of America the sum amounting to the

total cost of the work plus ten per cent (10%). Said payment shall be made in the following manner:

"The weekly payroll for all labor shall be submitted to the owner on Monday of each week and the owner shall immediately pay to the contractor the full amount of said payroll.

"On or about the first of each and every month, the contractor shall submit to the owner all invoices for materials, freight and express bills, drayage charges and bills for other such items, received by the contractor during the previous month as may not appear on the weekly payrolls, and the owner shall immediately pay to the contractor the sum amounting to the full amount of the aforesaid invoices and bills.

"Upon completion and acceptance of the work, the owner shall pay to the contractor the sum amounting to the full amount of the bills for materials, freight, express, drayage, etc., and such payrolls for labor as may not have been previously paid, and in addition to the above, the owner shall pay to the contractor the sum equivalent to ten per cent (10%) of the total cost of the completed work."

Thereafter, R. L. Blalock & Son ordered from plaintiff a carload of flooring which was shipped on 11 September, 1924, and used by them in remodeling said building, in accordance with the terms of the written contract; the purchase price of said flooring was $593.26; the bill for same was subsequently presented to Spear Motor Company by R. L. Blalock & Son as required by said contract, for payment; neither Spear Motor Company nor R. L. Blalock & Son have paid plaintiff for said flooring. The work under said contract has been completed by R. L. Blalock & Son and accepted by Spear Motor Company.

Spear Motor Company did not pay R. L. Blalock & Son the amount of bills for material, and of payrolls, for remodeling said building, in cash; the said company delivered to them, on account, two automobiles, valued at between $9,000 and $10,000; on 8 December, 1924; the balance due was settled by note for $2,800. No notice that plaintiff's claim for the lumber had not been paid by R. L. Blalock & Son, was given to Spear Motor Company, prior to its settlement with R. L. Blalock & Son.

On 11 February, 1925, plaintiff filed notice and claim of lien on the lot and building of Spear Motor Company, in Kinston, N. C., in the office of the clerk of the Superior Court of Lenoir County; said lien was filed within six months from the date of the furnishing of said material; this action was begun within six months from the date of the filing of said lien. Judgment by default final was rendered in this action in favor of plaintiff and against R. L. Blalock & Son, on 14 September, 1925. The action was tried at June Term, 1926, upon the complaint of plaintiffs and the answer of Spear Motor Company.

At the close of the evidence upon the facts admitted in the pleadings and by defendants during the trial, plaintiff moved for judgment. This motion was denied, and plaintiff excepted.

From judgment on the verdict that defendants, Spear Motor Company, were not indebted to plaintiff, and that plaintiff had no lien on the lot and building owned by Spear Motor Company, plaintiff appealed to the Supreme Court.

Rouse & Rouse for plaintiff.
Powers & Elliott, P. D. Croom for defendants.

CONNOR, J. The vital question involved in this appeal is the relationship between Spear Motor Company and R. L. Blalock & Son with respect to the work to be done by the latter for the former, under the written contract. There is no controversy as to the execution of the contract by the parties thereto, or as to its terms.

Plaintiff contends that under the contract R. L. Blalock & Son were agents of Spear Motor Company, and as such agents purchased from plaintiff the lumber which was used as material in remodeling the building; that Spear Motor Company is liable for the purchase price of said lumber, as principal, and that plaintiff has a lien on the lot and building of Spear Motor Company for the amount of the purchase price of said lumber by virtue of notice filed in the office of the clerk of the Superior Court. Defendants, Spear Motor Company, contend that R. L. Blalock & Son were independent contractors, with respect to the work done in remodeling its building, and that the company is not liable for said purchase price; that plaintiff, having failed to give said company notice as required by statute, before it had settled with said contractor, acquired no lien upon its property by the notice and claim of lien filed in the clerk's office. The issue raised by these contentions is one of law, to be determined by the court, and not of fact, to be submitted to the jury.

It is clear that Spear Motor Company would have been liable, upon the principle of *respondeat superior*, for a tort committed by R. L. Blalock & Son in doing the work which they had undertaken to do, under this contract, for it is expressly provided therein that R. L. Blalock & Son shall remodel the building on the lot owned by Spear Motor Company "in accordance with such plans and specific instructions as may be furnished by the owner." Spear Motor Company reserved the right not only to direct the manner in which the work should be done, but also to specify what material should be used. The right to control the work in every detail, and at every stage, was retained by Spear Motor Company. This has been declared the vital test for de-

termining whether a person employed to do work for another is an independent contractor, in actions to recover damages for a tort, where liability was denied by the party for whom the work was done, upon the ground that the *tort feasor* was an independent contractor and not the agent or servant of such party. *Greer v. Construction Co.*, 190 N. C., 632; *Aderholt v. Condon*, 189 N. C., 748; *Cole v. Durham*, 176 N. C., 289; *Simmons v. Lumber Co.*, 174 N. C., 220; *Gadsden v. Craft*, 173 N. C., 418; *Vogh v. Geer*, 171 N. C., 672; *Embler v. Lumber Co.*, 167 N. C., 457; *Harmon v. Contracting Co.*, 159 N. C., 22; *Hopper v. Ordway*, 157 N. C., 125; *Denny v. Burlington*, 155 N. C., 35; *Young v. Lumber Co.*, 147 N. C., 26; *Craft v. Timber Co.*, 132 N. C., 151.

It is further provided in the contract that on or about the first of each month R. L. Blalock & Son shall submit to Spear Motor Company all invoices for materials received by R. L. Blalock & Son during the previous month, and that Spear Motor Company shall immediately pay to R. L. Blalock & Son the amount of said invoices. Upon completion and acceptance of the work, Spear Motor Company, in addition to the amounts paid for material and labor, agreed to pay R. L. Blalock & Son an amount equal to ten per cent of the total cost of the work. This latter sum is manifestly the compensation which R. L. Blalock & Son were to receive for their services, to be rendered under the contract. The mode of payment provided in the contract is sometimes an important element to be considered in determining whether a party who has agreed to do work for another is an independent contractor, but it is not controlling. The circumstance that the workman is to receive no compensation until the satisfactory termination of his employment does not require that he be classed as an independent contractor. 14 R. C. L., p. 74, sec. 11. Where the facts with respect to the relationship of the parties to a contract for work are disputed, upon an issue submitted to the jury, the method and manner of payment may properly be considered by them in determining the issue (*Minor v. Sterenz*, 65 Wash., 423, 42 L. R. A., N. S., 1178), but where the contract of employment is in writing, and is unambiguous, the question whether the employee is a servant or an independent contractor is for the court and not for the jury, and the method and manner by which the employee is to be paid is immaterial. Ann. Cas., 1918C, p. 632, and cases cited.

Where the party who agrees to do the work is not an independent contractor, but a servant or agent, the party for whom the work is to be done, is liable as master, or principal, for torts of his servant or agent committed while prosecuting the work, upon the principle of *respondeat superior*; where the servant or agent, as authorized by the contract of employment, purchases material to be used in the perform-

ance of the contract, the master or principal is liable for the purchase price of the material upon the principle of *qui facit per alium, facit per se.*

In *Hardware Co. v. Banking Co.*, 169 N. C., 744, defendant Banking Company, in order to get its building completed, had agreed with its codefendant, who agreed to do the work, that it would pay for all materials which thereafter should be purchased by said codefendant, and used in completing said building. It was held that materials furnished by plaintiffs became the direct obligations of the Banking Company and not those of the original contractor. It is said in the opinion of *Brown, J.*: "It is immaterial whether the plaintiffs knew of the new agreement made in August, 1912, although it is found that they had knowledge of it. The liability of the agent is not exclusive. Although the plaintiffs extended credit to Carr in ignorance of the fact that he was acting for the Trust Company, the plaintiffs had the right to hold the undisclosed principal liable when discovered. It is well settled that an undisclosed principal is bound by executory simple contracts made by the agent and by the acts of the agent, done in relation thereto, within the scope of his authority and in the course of his employment. 31 Cyc., p. 1574, and cases cited in the notes. *Nicholson v. Dover*, 145 N. C., 18; *Combes v. Adams*, 150 N. C., 68; *Peanut Co. v. R. R.*, 155 N. C., 148."

Under the contract between Spear Motor Company and R. L. Blalock & Son, which was in writing, and unambiguous in its terms, it must be held as matter of law that the relationship between them was that of master and servant, or principal and agent, and not of owner and independent contractor. Upon the principle stated in *Hardware Co. v. Banking Co., supra*, Spear Motor Company, although an undisclosed principal, is liable to plaintiff for the purchase price of the lumber ordered by R. L. Blalock & Son and used in remodeling the building.

The right of plaintiff to recover judgment against Spear Motor Company, upon the facts of this case, is not barred by the judgment by default rendered in its favor against R. L. Blalock & Son, the agent of the undisclosed principal. The agency was denied by Spear Motor Company in its answer; it is expressly ordered in the judgment by default that the "cause be calendared in due course for trial on the issues raised by the pleadings according to the custom of the court." 21 R. C. L., 891, sec. 63 and sec. 68. The agency was not only not disclosed before the action was begun; it was denied by Spear Motor Company in its answer to the complaint. The facts in this case differentiate it from *Rounsaville v. Ins. Co.*, 138 N. C., 191. In that case it was held that a creditor who has recovered judgment against the agent of

an undisclosed principal, has thereby elected to hold the agent for his claim and cannot thereafter recover judgment against the undisclosed principal. Upon the facts of this case, we think it clear that plaintiff did not make an election to hold the agent which barred his right to judgment against his principal. If R. L. Blalock & Son were independent contractors, as contended by Spear Motor Company, or if they were agents for a principal, whom they had not disclosed, they were personally liable to plaintiff. 21 R. C. L., p. 895, sec. 95. Plaintiff cannot be held to have made an election, until the issue involving their relationship, raised by the answer of Spear Motor Company in the action in which both the agent and the principal were defendants, had been determined.

Notice and claim of lien for amount due for material furnished by plaintiff to defendant, Spear Motor Company, was filed as required by C. S., 2469 and C. S., 2470; the action was begun within six months from the date of the filing of the notice; plaintiff therefore has a lien on the lot and building of Spear Motor Company for the amount of the purchase price of the lumber for which Spear Motor Company is liable on the contract of purchase made by its agents.

In *Rose v. Davis,* 188 N. C., 355, it was held that a furnisher of material, which was used in the building by a contractor, acquired no lien on the building, under our statutes, by notice to the owner, filed after the owner had paid to the contractor the full contract price; and that it was immaterial that payment in full had been made in advance, in accordance with the contract between the owner and contractor. This principle has no application to the instant case, for we hold that plaintiff was not a sub-contractor or furnisher of material to the contractor; he is a creditor of the owner, by virtue of a contract made with the agent of the owner, and not a creditor of the contractor.

It is not necessary, therefore, for us to consider or determine whether the delivery of two automobiles, valued at between $9,000 and $10,000, by Spear Motor Company to R. L. Blalock & Son was a payment on account or not, in excess of amount due at time of notice to Spear Motor Company that plaintiff's claim had not been paid by R. L. Blalock & Son. Plaintiff's lien was acquired, not under C. S., 2437, but under C. S., 2433. The lien was perfected under C. S., 2469, and C. S., 2470, and not under C. S., 2438.

There was error in denying plaintiff's motion for judgment. There must be a

New trial.

NORTH CAROLINA AUTOMOTIVE TRADE ASSOCIATION ET AL. v. R. A. DOUGHTON, COMMISSIONER OF REVENUE OF NORTH CAROLINA.

(Filed 27 October, 1926.)

1. **Taxation—Automobiles—Local Agent—Sales Agent—Revenue Act of 1925.**

   Where the local dealer in automobiles has paid the license tax of $500 required by section 78, Revenue Act of 1925, and in conformity with the statute has kept the license issued properly posted at its located place of business, the ten-dollar tax is not required to be issued to its sales agents within the territory prescribed for the conduct of the business of a local agent, working directly thereunder.

2. **Appeal and Error—Feigned Issues—Moot Questions—Dismissal.**

   Where the parties to the action agree upon points involving a feigned issue, as to the law, or one which does not actually involve a litigated right, the case will be dismissed on appeal to the Supreme Court.

THIS was an action brought by the plaintiffs against the defendant, Commissioner of Revenue, for the purpose of restraining said commissioner from attempting to collect a $10.00 license tax upon automobile salesmen. The case was heard before *Calvert, J.*, at the August Term, 1926, of WAKE.

From the judgment rendered plaintiffs appealed.

Albert L. Cox and A. L. Purrington, Jr., for plaintiffs.

Attorney-General Brummitt and Assistant Attorney-General Nash for defendant.

BROGDEN, J. Hon. Thomas H. Calvert, the trial judge, rendered the following judgment:

"This cause having been removed from the Superior Court of Buncombe County to the Superior Court of Wake County, and the hearing of the motion to continue the injunction heretofore granted by Honorable W. F. Harding, judge presiding over the Superior Court of Buncombe County, having been by consent removed to be heard before me, the undersigned resident judge of the Seventh Judicial District, and being heard before him on Friday, 16 July, 1926, plaintiff Burwell-Harris Company appearing in person and by counsel, and the other plaintiffs appearing by the same counsel, General Albert L. Cox, and the defendant represented by the Attorney-General's office, the following facts are found upon the complaint and answer used as affidavits, and the testimony of Mr. Harris, of the Burwell-Harris Company:

1. The North Carolina Automotive Trade Association was at the time of the commencement of this action an unincorporated, voluntary

association of automobile dealers in the State of North Carolina, and has since then been incorporated as a North Carolina corporation. The Burwell-Harris Company is a distributor of Nash automobiles and trucks in the State of North Carolina, and is under sales contract between it and the Nash Motors Company of Wisconsin, a foreign corporation. The method of dealing is as follows: The motor vehicles manufactured by the Nash Motors Company are sold direct to the Burwell-Harris Company of Charlotte, N. C., a North Carolina corporation, it paying cash for the same, with the price for sale to individual purchaser fixed also by the Nash Motors Company.

The Burwell-Harris Company pays the license tax imposed upon those engaged in the business of selling automobiles and trucks in the State of North Carolina by section 78 of the Revenue Act of 1925. In consequence of the Burwell-Harris Company paying this $500 license tax, it has the privilege under section 78 of selecting those who are entitled to duplicate licenses as salesmen or dealers in the Nash automobiles or automobile trucks. The Burwell-Harris Company has exercised this privilege in appointing numerous dealers in the State of North Carolina and located in points other than Charlotte, which is the residence of the Burwell-Harris Company.

These dealers so selected by him have all paid the duplicate license tax of $10.00 imposed by section 78 of the Revenue Act.

2. These persons to whom said duplicate licenses are issued are of two classes: (1) located agencies; and (2) traveling agents.

3. For the purpose of levying the tax under the statute, the Commissioner of Revenue treats a located agency as one which has a fixed place of business in which, under section 94 of the Revenue Act, is to be kept posted the duplicate license issued to it by the Revenue Department at the request of the holder of the $500 dealer's license. The located agency having a place of business in which and from which it sells the particular machine, posting its license in its place of business, is protected from having to pay any other license tax. This protection extends not only to it, but to all its employees and agents in and about the place of business and acting to advance the interest of that particular located business.

4. Plaintiffs in their complaint charge that the Commissioner of Revenue is attempting to collect the $10 license tax upon the employees of a located agency. I find that there is no evidence in the case that for the past 18 months any such attempt has been made by the Commissioner of Revenue. The Commissioner of Revenue in his verified answer used as an affidavit expressly disclaims any intention to collect this $10 license tax from employees protected as above stated by a licensed located business. He admits that he does collect the $10 tax

from those employees traveling out from the located business under the $10 license tax or from the located business protected by the $500 license tax, and I find this to be the fact.

5. For the purpose of levying the tax under the statute, the Commissioner of Revenue considers a traveling agent as one who travels out either from a located business or at large, selling the particular automobile licensed to be sold. If this particular traveling agent is to be protected, he must have with him the $10 duplicate license issued him at the request of the holder of the $500 license. This duplicate license is to show the traveling agent's authority from the dealer and also his authority from the Commissioner of Revenue to sell the particular machine.

6. I find further that after the Department of Revenue has issued the duplicate license to located dealers selected by the plaintiff, the Burwell-Harris Company, that company has not anything to do with or any authority over the employees of said located dealer except as the located dealer is restrained by the provisions of the sales contract made by the Burwell-Harris Company with the Nash Motors Company as to the price to be charged for automobiles manufactured by the latter company and the territory within which such motor vehicles may be sold.

Upon these findings of facts I conclude as a matter of law that said agencies for the sale of automobiles and motor trucks are required to pay a license tax of $500 under section 78 of the Revenue Act of 1925, and that this payment includes all employees located at the headquarters of the business in the State and who do not work as traveling agents. Subagencies operating at a separate place of business other than such headquarters are required to pay a license tax of $10 for each subagency, and this protects all employees thereat who do not make or solicit sales outside of their respective locations, but it does not protect outside salesmen. The latter are required to carry with them a duplicate license at a cost of $10 to each one, to show their authority to sell under license issued at their headquarters.

It is thereupon ordered, adjudged and decreed that the restraining order heretofore issued in this cause by Honorable W. F. Harding be, and the same is hereby dissolved."

This judgment correctly interprets and declares the law. *Automotive Trade Asso. et al. v. Cochran,* 186 N. C., 159, and 187 N. C., 25.

Section 95 of the Revenue Act of 1923 provided, among other things, as follows: "But each person, firm, or corporation shall be required to take out separate license for each agent." These words are omitted in section 95 of the act of 1925, and the plaintiffs contend that this omission effects a material change in the law since the *Cochran case* was de-

cided. In discussing this phase of the case, the Attorney-General says: "With that provision left in section 95, it could be argued with great plausibility that each employee, though working in and about a licensed agency, should be required to take out a license. It was omitted from the act of 1925 for that express reason, and, with its omission, there is an abundance left in section 95 to sustain the position of defendant herein." We think this correctly states the law.

While the Court has passed upon the merit of the question presented, this appeal must be dismissed.

It is alleged in the complaint that the defendant, Doughton, "is undertaking to levy a license tax of $10.00 on each and every employee of automobile dealers and distributors in North Carolina, who engages in selling automobiles, and to collect said license tax of $10.00 from each of said salesmen." In this connection the trial judge found as follows: "I find that there is no evidence in the case that for the past eighteen months any such attempt had been made by the Commissioner of Revenue." Therefore, this appeal presents only a hypothetical question.

In *Parker v. Bank,* 152 N. C., 253, *Brown, J.,* says: "With perfect respect and deference for the learned counsel as well as for the parties, this is evidently a 'suit made to order,' arising not out of a real controversy between the parties litigant, but instituted solely for the purpose of obtaining the opinion of the Court upon a 'feigned issue.'"

It has been clearly established that the Court does not decide mere hypothetical questions. *Blake v. Askew,* 76 N. C., 325; *Board of Education v. Kenan,* 112 N. C., 567; *Kistler v. R. R.,* 164 N. C., 365; *Burton v. Realty Co.,* 188 N. C., 473.

Appeal dismissed.

L. H. BANE v. J. L. POWELL, A. G. SMALL, F. M. HESTER, R. C. SADLER, D. M. THOMPSON, W. H. POWELL AND J. L. BRITTON.

(Filed 27 October, 1926.)

1. Banks and Banking—Insolvency—Officers—Deposit Received by Officers With Knowledge of Insolvency—Actions—Receivers—Parties—Statutes.

Where the managing officials of a bank know of its insolvency, and permit a deposit to be made by its customer, the assets are increased and not diminished, and an action will lie in behalf of the depositor against such officers committing the wrong without demand upon the receiver later appointed, or the necessity to have him bring the action, in behalf

of the wronged depositor, whose money has thus become an asset, in the receiver's hands, and not a liability of the defunct bank. *Douglass v. Dawson*, 190 N. C., 458, cited and distinguished. 3 C. S., 224(g).

2. Same—Pleadings—Demurrer—Appeal and Error—Reversible Error. It is unnecessary for the complaint to have alleged a demand upon the receiver of a defunct bank, and his refusal to bring action in behalf of plaintiff, under the facts of this case, and for the trial judge to sustain a motion of nonsuit upon that ground alone, was reversible error.

APPEAL by plaintiff from *Barnhill, J.*, at August Term, 1926, of COLUMBUS. Reversed.

Action by depositor to recover of officers and directors of a bank damages resulting from loss of deposit received by the bank, when it was insolvent, upon allegation that said officers and directors knew of the insolvency of said bank, and with such knowledge permitted the bank to receive plaintiff's deposit.

From judgment sustaining demurrer, upon the ground that the complaint failed to state a cause of action, plaintiff appealed to the Supreme Court.

Tucker & Proctor for plaintiff.
Powell & Lewis and Dickson McLean for defendants.

CONNOR, J. The facts material for the decision of the question presented by this appeal, as alleged in the complaint, and admitted by the demurrer, upon the ground that they do not constitute a cause of action, in favor of plaintiff and against defendants, are as follows:

1. On 20 January, 1926, defendants were officers and directors of the Bank of Columbus, a corporation organized and doing business under the banking laws of the State of North Carolina; plaintiff on said date deposited in said bank the sum of $6,255.00.

2. On the date of said deposit, and for a long time prior thereto, during which defendants had been continuously officers and directors of said bank, the Bank of Columbus was and had been insolvent, unable to meet its obligations, and unsafe; when said bank received plaintiff's deposit, defendants, as officers and directors, knew that said bank was then and had been for a long time insolvent, unable to meet its obligations, and unsafe; with such knowledge, defendants wrongfully received or wrongfully permitted employees of the bank to receive said deposit.

3. On 29 January, 1926, the Bank of Columbus closed its doors and ceased to do business, because of its insolvency; on said date, there remained in said bank the sum of $6,041.68 of the deposit made by plaintiff on 20 January, 1926; plaintiff has demanded payment to him by

said bank of this sum; the bank has failed to pay said sum or any part thereof to plaintiff, because of its insolvency.

Plaintiff alleges that he has been damaged by the wrongful act of defendants, as alleged, in the sum of $6,041.68, and demands judgment that he recover said sum with interest from 1 February, 1926, of defendants and each of them.

On 18 March, 1926, the date of the issuance of the summons in this action, no receiver of the Bank of Columbus had been appointed; subsequently a receiver was appointed for said bank; at the time this cause came on to be heard, upon defendants' demurrer to the complaint, the said receiver was engaged in the administration of the assets of said bank. There is no allegation in the complaint that the receiver has refused to bring an action against defendants upon the cause of action set out therein, or that demand has been made upon him by plaintiff to bring such action.

The court was of opinion, as appears from the judgment sustaining the demurrer, that the complaint failed to state a cause of action in favor of plaintiff and against defendants, because it is not alleged therein that the receiver had refused to bring an action against defendants upon the cause of action set out in the complaint, or that demand had been made upon him by plaintiff to bring such action. It is stated in the briefs filed in this Court, for both plaintiff and defendants, that the Court sustained the demurrer, upon the authority of *Douglass v. Dawson,* 190 N. C., 458, 130 S. E., 195. It must be conceded that if the cause of action set out in the complaint in the instant case is identical with that set out in the complaint in *Douglass v. Dawson,* there was no error in the judgment. The demurrer in *Douglass v. Dawson* was properly sustained; no sufficient reason has been presented to cause us to question the correctness of our decision upon the appeal in that case. In the opinion in *Douglass v. Dawson,* it is said: "The test, therefore, to be applied to determine whether or not the cause of action, if any, alleged in the complaint is vested in the receiver, and must be prosecuted by him, or may, upon his refusal, after demand, to institute the action, be maintained by creditors, depositors or stockholders, is the title or ownership of the sum or sums which may be recovered of defendants as damages for their negligence or wrongful acts. If the sum or sums for which defendants may be liable, and which may be recovered upon the cause of action set out in the complaint, constitute assets of the corporation, the action must be prosecuted by and in the name of the receiver, or his refusal, upon demand, must be alleged, in order that a creditor, a depositor, or a stockholder may maintain the action."

It is not alleged in the complaint in the instant action that defendants, as its officers and directors, by their negligence or wrongful acts,

caused the bank to become, or to be, insolvent, as was the case in *Douglass v. Dawson.* The bank suffered no loss by the wrongful act of defendants, with respect to the reception of plaintiff's deposit, and therefore has sustained no damage. The sum for which defendants are liable in damages, upon the facts admitted by the demurrer, is not an asset of the bank; the title or ownership of said sum was not in the bank prior to the appointment of the receiver, and therefore did not vest in him upon his appointment and qualification. Plaintiff's loss, resulting from defendant's wrongful act, was the bank's gain. Its assets, instead of being depleted, or diminished to its damage, were increased as the result of the wrongful act of defendants. It is true that its liabilities were also increased, but as the bank was then insolvent, the result of the transaction was manifestly beneficial to the bank, its depositors, creditors and stockholders. Defendants' act in permitting the bank to receive plaintiff's deposit, when they knew that it was insolvent, was a wrong done to plaintiff, personally and individually; plaintiff alone suffered loss, because of such wrongful act; he alone is therefore entitled to recover damages resulting from such loss. In *Douglass v. Dawson,* we said: "We do not hold that upon proper allegations, a creditor, depositor or stockholder, suing in his individual right, may not recover of officers or directors of a corporation, engaged in the banking business, under the laws of this State, damages for a wrong done to him personally. . . . Damages, however, resulting from breach of official duty, whereby the bank becomes insolvent, and thus unable to pay creditors or depositors, are and should be recoverable, by the receiver; damages resulting from breach of duty which the officer or director owes to the creditor or depositor, individually, may properly be recovered by the creditor or depositor who has suffered a loss peculiar to himself. The right of action by the individual creditor, depositor or stockholder, against officers, or directors is not affected by the receivership, occasioned by insolvency. 7 C. J., 735."

In his opinion in *S. v. Hightower,* 187 N. C., 300, speaking of sec. 85, ch. 4, Public Laws, 1921 (3 C. S., 224(g), which denounces the act of defendants as a felony, the present *Chief Justice* says: "The statute was designed to protect the depositing public against this kind of practice on the part of officers and employees of banks, and they will be held to a strict accountability under its provisions when they receive, or when any such officer permits an employee to receive deposits therein, with knowledge of the fact that, by reason of the bank's insolvency, such deposits then being received are taken at the expense or certain peril of the depositors presently making them."

The demurrer cannot be sustained upon the authority of *Douglass v. Dawson;* on the contrary, a careful reading of the opinion in that case

will clearly disclose that it is an authority sustaining the right of plaintiff to recover upon the cause of action set out in the complaint in this action.

The right of a depositor in a bank, who has sustained damages, peculiar to himself, by the wrongful act of the officers and directors of the bank, to recover such damages in an action brought by him against the officers and directors, is not affected by the decision in *Douglass v. Dawson;* the right is expressly recognized in the opinion in that case. A violation of 3 C. S., 224(g), by an employee, or by officers and directors of a bank, resulting in damages to a depositor, is a wrong to the depositor; he and not the bank or its receiver is entitled to maintain an action to recover the damages resulting from such wrong. See *Russell v. Boone,* 188 N. C., 830; *Houston v. Thornton,* 122 N. C., 365; *Townsend v. Williams,* 117 N. C., 330; *Solomon v. Bates,* 118 N. C., 311; *Tate v. Bates,* 118 N. C., 287. Where the wrongful act of officers and directors is a breach of their duty to the bank, resulting in loss to the bank, the damages recoverable are assets of the bank; upon its insolvency and upon the appointment of a receiver, for the liquidation of the bank, such receiver, in the first instance, may alone maintain the action to recover the damages, as assets of the bank, to be administered by him for the benefit of all the depositors, creditors, or stockholders of the insolvent bank.

The judgment must be

Reversed.

STATE PRISON v. MASSACHUSETTS BONDING AND INSURANCE COMPANY AND STATE PRISON v. NATIONAL SURETY COMPANY.

(Filed 27 October, 1926.)

1. **Roads and Highways—Laborers—Material—Statutes—Notice.**

   The provisions of chapter 160, sec. 3, Public Laws of 1923, are prospective in effect, requiring among other things, that written notice of the subcontractor's claim for labor and material used in the construction of a State highway, be furnished to the State Highway Commission, etc., and has no application where the labor done and the materials furnished were prior thereto, except as to suits pending.

2. **Pleadings—Demurrer—Statutes—Remedy.**

   An amendment to a statute which affects the remedy should be taken advantage of by answer and not by demurrer.

3. **Roads and Highways—Materialmen and Laborers—Contracts—Principal and Surety—State's Prison.**

   Where a contractor with the State Highway Commission for the building of a State highway contracts among other things, to pay for the labor

and material therein used, the surety on his bond becomes liable therefor when its bond is conditioned upon the faithful performance by the contractor of his obligation under his contract, and that he "will well and truly pay all and every person furnishing materials or performing labor in or about the construction of the said roadway," and applies to convicts and materials furnished for the work by the State's prison.

4. Principal and Surety—Equity—Equality of Liability—Roads and Highways—State Highway Commission—State's Prison — Laborers and Materialmen.

Where a contractor with the State Highway Commission has furnished a bond sufficient for the protection of laborers on and material furnished for a State highway, and the contractor has contracted with the State's prison to furnish him convict labor for the work, and having defaulted under his contract for the erection of the highway, owes for the work and labor done thereon, the equitable doctrine of equality will apply, and each surety will be equally liable with the other, the doctrine of primary and secondary liability among the sureties not applying.

APPEAL by Massachusetts Bonding and Insurance Company from *Barnhill, J.*, at April Term, 1926, of WAKE.

Civil actions to recover on two surety bonds, consolidated by consent, and tried on the following issues:

"1. Did the plaintiff, the State Prison, do and perform the work contracted to be done for Porter & Boyd, as set out in contract offered in evidence? Answer: Yes.

"2. If so, what amount, if anything, is due therefor? Answer: $5,389.53."

From a judgment on the verdict for plaintiff, in which it was adjudged that the liability of the Massachusetts Bonding and Insurance Company was primary, and that of the National Surety Company secondary, the Massachusetts Bonding and Insurance Company appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for plaintiff.

Flowers & Boyd and Ruark & Fletcher for defendant, Massachusetts Bonding and Insurance Company.

S. Brown Shepherd for defendant, National Surety Company.

STACY, C. J. On 23 January, 1922, Porter & Boyd, Inc., road contractor, entered into a written agreement with the State Highway Commission to construct a section of road in Mitchell County, known as Project No. 856, in which it was stipulated, among other things, that, for and in consideration of the price agreed upon, the contractor was "to furnish and deliver all the materials and to do and perform all the

work and labor in the improvement" of the said section of highway; and to insure a faithful compliance with the terms and conditions of the said contract in all respects, on the part of the contractor, the State Highway Commission took from the contractor, as principal, and the Massachusetts Bonding and Insurance Company, as surety, a bond in the sum of $99,570.00, conditioned for the faithful performance of the contract; also to "save harmless the State Highway Commission of North Carolina from any expense incurred through the failure of said contractor to complete the work as specified," and "well and truly pay all and every person furnishing material or performing labor in and about the construction of said roadway."

Preparatory to carrying out its contract with the State Highway Commission on the project above mentioned, Porter & Boyd, Inc., entered into a written agreement with the State prison in which it was stipulated, among other things, that for a certain consideration, the plaintiff would lease or "hire to the party of the second part a number of State convicts varying from sixty to seventy-five (as agreed upon from time to time) to be used in the quarrying of rock and building of State highways in Mitchell County"; and to insure the faithful performance of this contract, the State prison took from Porter & Boyd, Inc., as principal, and the National Surety Company, as surety, a bond in the sum of $5,000.00, conditioned as follows:

"Now, therefore, the condition of this obligation is such that if the party of the second part shall faithfully perform the contract on his part, and satisfy all claims and demands, incurred for the same, and shall fully indemnify and save harmless the party of the first part from all cost and damage which he may suffer by reason of failure so to do, and shall fully reimburse and repay the party of the first part all outlay and expense which the party of the first part may incur in making good any such default, then this obligation shall be null and void; otherwise, it shall remain in full force and effect."

The contractor defaulted under its contract with the State prison and also under its contract with the State Highway Commission.

Suits were instituted by the State prison to hold both bonds liable to the extent of $5,389.53, the amount due by the contractor for labor of the leased convicts and unpaid at the time of its failure. The two actions were consolidated and tried as one, resulting in a verdict and judgment as above stated.

In limine, the Massachusetts Bonding and Insurance Company demurs *ore tenus* to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action, in that, it nowhere appears on the face of the complaint, by averment or otherwise, that the plaintiff has complied with chapter 160, sec. 3, Public Laws 1923, re-

quiring written notice of its claim to be presented to the State Highway Commission within six months after the completion of the said work, or be barred against recovering from said commission or any bondsman. In support of its position, the defendant relies upon the following authorities: *Dockery v. Hamlet,* 162 N. C., 118; *Board of Ed. v. Greenville,* 132 N. C., 4; *Dayton v. Asheville,* 185 N. C., 12.

With respect to the demurrer, it is sufficient to say that the bonds and contracts in suit were executed prior to the time section 3 of the act above mentioned became effective (3 September, 1923), and it is apparent that the provisions of this amendatory statute were intended to be prospective, and not retrospective, in operation. See *Humphrey v. Stephens,* 191 N. C., 101, and *Hicks v. Kearney,* 189 N. C., 316. Hence, if intended to affect the right of action, and necessary to be pleaded, we think the provision must be held nonapplicable to the instant case. *Comrs. v. Blue,* 190 N. C., 638. To hold otherwise would threaten the constitutionality of the section. 25 R. C. L., 789. On the other hand, if it were intended to affect only the remedy, it may be taken advantage of by answer and not by demurrer. In either event, the demurrer must be overruled. *Brick Co. v. Gentry,* 191 N. C., 636.

The contention of the Massachusetts Bonding and Insurance Company that furnishing or supplying labor for the work in question by the State prison, under the circumstances disclosed by the record, is not within the terms of the bond executed by it as surety, must be resolved against the bonding company on authority of what was said in *Aderholt v. Condon,* 189 N. C., 748, *Town of Cornelius v. Lampton,* 189 N. C., 714, and *Scheflow v. Pierce,* 176 N. C., 91.

We also think it is clear that the National Surety Company is equally liable to the plaintiff, to the extent of its bond, for the payment of the contractor's debt. The contractor agreed to pay plaintiff for the labor furnished or supplied, and the National Surety Company obligated itself as surety to be bound until the contractor should "faithfully perform the contract on his part," i. e., pay for the labor so furnished or supplied. *Mfg. Co. v. Andrews,* 165 N. C., 285.

We then have a case of one debt secured by two bonds. *Comrs. v. Dorsett,* 151 N. C., 307; *Smith v. Carr,* 128 N. C., 150; Adams Equity, 269-270. In the citation to Adams Equity, just made, it is said: "The right of contribution arises among sureties, where one has been called on to make good the principal's default and has paid more than his share of the entire liability. If all the sureties have joined in a single bond, the general rule, in the absence of any express or implied contract, is that of equality. If their liabilities have been created by distinct bonds, the contribution is in proportion to their respective penalties."

It was error to hold that the liability of the Massachusetts Bonding and Insurance Company was primary and that of the National Surety Company secondary.

Let the cause be remanded, to the end that judgment may be entered in accordance with the law as declared herein. The costs will be divided between the two defendants.

Remanded.

LUTA B. HARDEN v. THE CITY OF RALEIGH AND JOHN W. MANGUM, BUILDING INSPECTOR.

(Filed 27 October, 1926.)

1. Statutes—Municipal Corporations—Police Powers—Constitutional Law—Discrimination—Certiorari.

Where, in pursuance of authority conferred by statute a city has divided its territory into certain zones or districts, giving an inspector certain judicial powers as to kind or class of buildings to be erected therein, under a board of adjustment and review, providing also for *certiorari* to issue from the courts, the requirements for each zone or district uniform and for the health, morals and safety of its citizens, is a valid exercise of such powers both as to the statute conferring the same, and the ordinance, and is not contrary to our organic law inhibiting discrimination. 3 C. S., 2776(r-aa).

2. Same—Filling Stations—Automobiles.

Where there has been uniformity in the creation and exercise of the authority under an ordinance passed in pursuance of statute, in refusing to permit the erection of a gasoline filling station in a proper district, there is no violation of the Constitution against discrimination.

APPEAL by defendants from *Barnhill, J.*, at March Term, 1926, of WAKE.

The plaintiff owns a lot on the corner of Hillsboro Street and Ashe Avenue in the city of Raleigh, and in December, 1924, she applied to the building inspector for a permit to construct thereon a gasoline filling station, filing with her application plans and specifications as required by the ordinances of the city. Her application was denied and she brought suit praying that a writ of mandamus issue requiring the defendants to grant her permission to build the proposed filling station on the described lot. The case was heard by consent on the plaintiff's appeal from the decision of the board of adjustment as upon a writ of *certiorari*, and it was adjudged that the act of the Legislature providing for the zoning of the city is constitutional and that the or-

dinances passed pursuant to the act are valid. It was further adjudged that the plaintiff's lot is in a neighborhood business district; that the ordinances do not prohibit the construction of a filling station in such districts; that the defendants have permitted filling stations to be constructed in such districts; that the board of adjustment has exercised its discretion in individual cases and not on any general or specific regulation or rule, and that the defendants could not exercise an arbitrary discretion in individual cases. For these reasons it was finally adjudged that the permit be issued and the plaintiff be granted leave to build the filling station on her lot as prayed. The defendants excepted and appealed.

Wm. B. Jones for plaintiff.
Manning & Manning and Wiley G. Barnes for defendants.

ADAMS, J. At the special session of 1921 the General Assembly enacted a public-local law applicable to the counties of Buncombe and New Hanover, providing for the establishment of planning commissions in the cities and towns therein, and thereafter amended the act by including the county of Wake. P.-L. L., Ex. Ses. 1921, chaps. 169, 246. The powers thus conferred were enlarged and extended by a general law empowering cities and towns to adopt zoning and other regulations. Public Laws 1923, ch. 250; 3 C. S., 2776(r) *et seq.*

The plaintiff assailed these several acts and the ordinances adopted by the city pursuant thereto on the ground that they conflict with the organic law; but this question is not before us for the reason that the trial court decided this point against the plaintiff and she did not appeal from the adverse ruling.

The act of 1923, *supra,* is comprehensive; it contains a grant of powers not contained in the other acts. For the purpose of promoting health, safety, morals, and the general welfare, the General Assembly delegated these powers to the legislative body of cities and towns—the power to regulate the location and use of buildings for trade, industry, or residence; to prescribe uniform districts for each kind or class of buildings; to provide the manner in which such restrictions shall be enforced, and to amend, supplement, change, modify, or repeal such restrictions or regulations; to appoint a board of adjustment who may review, reverse, affirm, or modify any administrative order, requirement, decision, or determination appealed from, and to vary or modify any of the regulations or provisions of any ordinance relating to the construction of buildings, so that the spirit of the ordinance shall be observed and substantial justice done. 3 C. S., 2776(r-aa).

The concurring vote of four members of the board of adjustment is necessary to reverse any order of the building inspector and every decision of the board is subject to review by proceedings in the nature of *certiorari.*

In the exercise of the authority given it by the Legislature the city designated certain zones or districts, one division of which is neighborhood business districts. The plaintiff's lot is in this class. The ordinance provides that in a district of this class no building shall be used or erected for any trade, industry, or use that is noxious or offensive by reason of the emission of odor, dust, smoke, gas, fumes, vibration, or noise.

It is evident, we think, that the board of adjustment is clothed, if not with judicial, at least with *quasi*-judicial power, it being its duty to investigate facts and from its investigation to draw conclusions as a basis of official action and to exercise discretion of a judicial nature. These are not mere ministerial duties. Where the law prescribes and defines a duty with such certainty as to leave nothing to the exercise of judgment or discretion the act is ministerial; but the exercise of judgment or discretion may be regarded as the usual test by which to determine whether an act is ministerial or judicial. Within the class of *quasi*-judicial acts fall the board's conclusions as to whether the proposed building would be noxious or offensive or detrimental to the public safety or welfare by reason of its situation or the surrounding conditions; also in this class is the legal discretion to be exercised by the board upon the conclusions reached. As we construe them the ordinances are not wanting in uniformity; nor is the board's exercise of *quasi*-judicial functions arbitrary or subject to the objection that they deal with individual cases without regard to uniformity. In one part of a district a filling station may be noxious or offensive to the public within the purview of the ordinance, and in another part it may not be; at one place it may menace the public safety and at another it may not. Conditions and probable results must be taken into account. This is the principle on which the board of adjustment has acted; it passes on individual cases, of course; but each case is determined in the contemplation of the statute and the ordinance by a uniform rule.

Quasi-judicial functions, when exercised, not arbitrarily, but in subordination to a uniform rule prescribed by statute ordinarily are not subject to judicial control. It is only in extreme cases, those which are arbitrary, oppressive, or attended with manifest abuse, that the courts will interfere. In *Rosenthal v. Goldsboro*, 149 N. C., 128, it is said: "It may now be considered as established with us, that our courts will always be most reluctant to interfere with these municipal governments in the exercise of discretionary powers, conferred upon them for

the public weal, and will never do so unless their action should be so clearly unreasonable as to amount to an oppressive and manifest abuse of their discretion. This position is, we think, supported by the better reason, and is in accord with the decided weight of authority." *Parks v. Comrs.*, 186 N. C., 490; *Lee v. Waynesville,* 184 N. C., 568; *S. v. Vanhook,* 182 N. C., 831; *Dula v. School Trustees,* 177 N. C., 426; *Rollins v. Winston-Salem,* 176 N. C., 411.

In the cases cited by the plaintiff the right of dominion was restricted without regard to any general or uniform rule, or wrongful discrimination was apparent, or the exercise of power was arbitrary and unwarranted. In the present case a tribunal was established and charged with duties, not ministerial, but at least *quasi*-judicial and subject to review as the statute prescribed.

The judgment is

Reversed.

W. PLEAS BOYD v. V. A. CAMPBELL.

(Filed 27 October, 1926.)

1. Deeds and Conveyances—Clerical Error in Reciting the Receipt of Consideration.

Where a deed conveys certain lands, it will not be declared ineffectual because of a recitation therein that the consideration was paid to the grantee, when it clearly appears from the other parts of the deed, construed as a whole, that the grantor received it.

2. Deeds and Conveyances—Interpretation—Intent.

Technical rules in interpreting a conveyance of lands that will defeat the obvious intent of the parties as gathered from the entire instrument, will not prevail unless such intent is repugnant to the terms of the grant or is in conflict with some canon of construction or some settled rule of law.

3. Deeds and Conveyances—Repugnant Clauses—Interpretation.

Where there are repugnant clauses appearing in a deed to lands, nothing else appearing as controlling their interpretation, the last will be rejected in favor of the former one.

4. Estates—Tenants in Common—Fee Tail—Statutes—Fee Simple.

While an estate conveyed to C. and his children executed and delivered when C. has living children conveys to the grantees as tenants in common, it is different when at that time C. has no children, and in the latter event an estate tail is conveyed which, by our statute is converted into a fee simple. C. S., 1734.

5. Estates—Remainders—Fee—Limitation After a Fee—Conditions.

An estate may not be limited after a prior estate granted in fee except by executory devise or making the first estate terminable upon a condition upon which the latter limitation becomes effectual.

6. Same—Uses and Trusts—Shifting Uses.

Where an estate in fee is limited after the conveyance in fee upon condition or the happening of a contingency, the latter limitation may become effective under the doctrine of shifting uses from the first taker to the latter one.

7. Same—Estates for Life.

Where the first taker under the conveyance by deed of an estate takes the fee simple, a fee in the same lands may not be limited to take effect thereafter, there being no preceding life estate created by the instrument or condition broken to make it effective.

APPEAL by defendant from *Harding, J.*, at July Term, 1926, of HAYWOOD.

Submission of controversy without action. C. S., 626. The plaintiff has been in the peaceable possession of three tracts of land since 1911, it being admitted that he is the owner of two of these tracts under a deed from his mother. On 1 April, 1926, the plaintiff and the defendant entered into a written contract by the terms of which the plaintiff was to convey to the defendant for the agreed consideration of $2,000 the three tracts referred to above; and on 9 April the plaintiff tendered to the defendant a deed in fee simple with the usual covenants, but the defendant refused to accept it or to pay the purchase price on the ground that the plaintiff could not convey a title in fee. There being no dispute as to the two tracts conveyed to the plaintiff by his mother, the controversy turns upon the construction of the deed hereinafter set out. If the plaintiff acquired a fee simple under this deed he can convey a good title to the three tracts described in his contract. It is admitted that the plaintiff is the Pleas Clodfeler mentioned in the purported conveyance. The deed is as follows:

"STATE OF NORTH CAROLINA
..... COUNTY.

This deed was made 22 February, 1910, by W. J. G. B. Boyd of Haywood County and State of North Carolina, of the first part, to Pleas Clodfeler, his children, their heirs and then to his grandchildren forever of county and State of....., of the second part, witnesseth:

That said Pleas Clodfellow for and in consideration of the sum of five hundred dollars paid by the said Clodfellow to W. J. G. B. Boyd, paid by and for the further consideration of love, the receipt of which is hereby acknowledged, ha.... bargained and sold, and by these presents do bargain, sell and convey to said the said Pleas Clodfellow his chil-

dren and then to his grandchildren forever, and heirs and assigns, a certain tract or parcel of land in ..... Township, Haywood County, State of North Carolina, adjoining the lands of W. J. G. B. Boyd, Thomas Evans and the Shelton boys, on the head waters of Herseys Mill Creek, one of Jonathan Creek tributary streams and others, bounded as follows, viz.:

(Description).

To have and to hold the aforesaid tract or parcel.....and all privileges and appurtenances thereto belonging to the said Pleas Clodfellow, to him and his children, their lives, heirs and assigns to and then to his grandchildren forever, only use and behoof forever.

And the said W. J. G. B. Boyd covenants that he is seized covenant to and with the said Pleas Clodfellow and his children during their natural lives, and then to his grandchildren forever, heirs and assigns ..... that..... seized of said premises in fee and ha.... a right to convey the same in fee simple; that same are free from all incumbrances and that W. J. G. B. Boyd will warrant and defend the title to the same against the claims of all persons whatsoever.

In testimony whereof the said ..... has hereunto set ..... hand ..... and seal ..... the day and year first above written. W. J. G. B. BOYD. (Seal.)

Attest: J. A. FERGUSON."

The plaintiff, when this deed was executed and delivered to him, was a single man and had no children. W. J. G. B. Boyd, the grantor, died in 1912, and in 1913 the plaintiff married and now has three young children, but no grandchildren.

The defendant contends that the deed is inoperative because there are no words of conveyance to the grantee, that the grantee conveyed to himself, and in any event took a life estate with remainder to his children or grandchildren.

Upon the agreed facts it was adjudged that the plaintiff is the owner in fee of all the tracts and that the defendant must accept the deed tendered him and pay the purchase price.

Morgan & Ward for plaintiff.
Joseph E. Johnson for defendant.

ADAMS, J. The deed is not invalidated by the clause in which the grantee purports to convey to himself. In every conveyance of land there must be a grantor, a grantee, and a thing granted. The grantor

cannot make himself the grantee; but W. J. G. B. Boyd, who signed the deed, is named as the grantor, and with the exception of one inadvertence the plaintiff is referred to as the grantee. The error is clerical and the objection must be resolved against the appellant under the principle stated in *Berry v. Cedar Works*, 184 N. C., 187. See, also, *Yates v. Ins. Co.*, 173 N. C., 473.

Whatever the former doctrine may have been the courts do not now regard with favor the application of such technical rules as will defeat the obvious intention of the parties to a deed, it being an elementary rule of construction that their intention as expressed in the deed shall prevail unless it is repugnant to the terms of the grant or is in conflict with some canon of construction or some settled rule of law. *Seawell v. Hall*, 185 N. C., 80; *Lumber Co. v. Herrington*, 183 N. C., 85; *Pugh v. Allen*, 179 N. C., 307; *Williams v. Williams*, 175 N. C., 160; *Springs v. Hopkins*, 171 N. C., 486.

As a rule if there are repugnant clauses in a deed the first will control and the last will be rejected. *Fortune v. Hunt*, 152 N. C., 715; *Wilkins v. Norman*, 139 N. C., 40; *Blackwell v. Blackwell*, 124 N. C., 269. While this rule is in subordination to the position that the intent of the parties as embodied in the entire instrument is the end to be attained we must not lose sight of another principle, that is, that where rules of construction have been settled they should be observed and enforced. *Wilkins v. Norman, supra; Midgett v. Meekins*, 160 N. C., 42; *Bagwell v. Hines*, 187 N. C., 690.

The following are the clauses to be considered:

1. To Pleas Clodfeler, his children, their heirs, and then to his grandchildren forever. (Premises.)

2. To the said Pleas Clodfellow, his children and then to his grandchildren forever and heirs and assigns. (Granting clause.)

3. To the said Pleas Clodfellow, to him and his children, their lives, heirs and assigns, and then to his grandchildren forever, only use and behoof forever. *(Habendum.)*

Now, as to the first clause. Given, an estate to A. and his children; if A. has children when the deed is executed he and they take as tenants in common. *Cullens v. Cullens*, 161 N. C., 344. In *Blair v. Osborne*, 84 N. C., 417, cited in the appellant's brief, the deed, which was executed prior to 1879 (C. S., 991), named the grantee in the premises, and in the *habendum* the grantee and her children; and it was held that the grantee took a life estate and the children a remainder. Here Pleas Clodfeler, or Clodfellow, and his children are mentioned in all the clauses; the cited case is, therefore, not controlling. If, in the assumed case A. has no child when the deed is executed he takes an

estate tail, which, under our statute, is converted into a fee. C. S., 1734; *Cole v. Thornton,* 180 N. C., 90. When Boyd executed the deed in question the grantee was not married; he had no children; so the words "To Pleas Clodfeler his children their heirs," make a fee simple.

What effect, if any, has the phrase immediately following, "And then to his grandchildren forever"? A fee may be limited after a fee by a conditional limitation or an executory devise—this upon the theory that under the doctrine of shifting uses inheritance may be made to shift from one person to another upon a supervening contingency. *Smith v. Brisson,* 90 N. C., 284. But the contingency is essential. For example, a condition in a deed followed by a limitation over to a third person in case the condition is not fulfilled, or in case there is a breach of it, is a conditional limitation. If the condition is broken or not fulfilled, as the case may be, the first estate comes to an end and the subsequent estate arises. It is said to be conditional because the event or contingency destroys or abridges the first estate; it is termed a limitation because upon the happening of the contingency the estate passes to the person having the next expectant interest. *Proprietors v. Grant,* 3 Gray, 142. In this clause there is no event or contingency upon the happening or breach of which the estate to the grantee is to be defeated, abridged, or "cut down to make room" for the purported limitation to the grandchildren. *Massengill v. Abell, ante,* 240; *McDaniel v. McDaniel,* 58 N. C., 351. The latter part of the clause is, therefore, ineffectual to divest the fee just previously granted. The grandchildren cannot take as contingent remaindermen for the reason that there is no precedent particular estate to support the remainder. No remainder can be limited after the grant of estate in fee; for a part cannot be reserved after the whole is disposed of. *McDaniel v. McDaniel, supra.* The same reasoning applies to the second clause; and as to the third it is apparent that the words, "their lives heirs and assigns," are repugnant. There is no presumption that the grantor assumed the impossible task of conveying to the grantee in a single phrase both a life estate and a fee simple. Either "their lives" or "heirs and assigns" must yield; and obviously the former, because it is repugnant to the fee previously conveyed, while the latter is entirely consistent with it. Here also the attempted limitation to the grandchildren is of no effect in destroying or abridging the fee. The only question is the quantity of the estate; and this, as we understand, the appellant admits is not affected by words used in the covenant of seizin.

The judgment is

Affirmed.

THE MURCHISON NATIONAL BANK OF WILMINGTON v. WALTER CLARK AND THE COMMERCIAL CASUALTY INSURANCE COMPANY.

(Filed 27 October, 1926.)

Municipal Corporations—Cities and Towns—Public Buildings—Contracts—Principal and Surety—Materialmen — Laborers — Subrogation—Equity.

Where a bank has loaned money to a contractor who has defaulted in his payment to material furnishers and laborers on a public building, without taking assignments of their claims or directly for their payment, it cannot acquire a right of action against the surety on the contractor's bond or claim thereunder, even to the extent some of the money so loaned may have been paid to them by the contractor.

APPEAL by plaintiff from *Clifford, Emergency Judge,* at September Term, 1926, of DURHAM.

Civil action to recover on a bond given by Walter Clark, contractor, with the Commercial Casualty Insurance Company as surety thereon, to insure the faithful performance of a contract to build a county home in Durham County, "and satisfy all claims and demands incurred for the same," and "fully indemnify and save harmless the owner from all costs and damages which it may suffer by reason of failure so to do," the plaintiff, Murchison National Bank, having loaned to the contractor sums aggregating more than $17,000.00, as represented by several promissory notes, with which to pay laborers doing work on and materialmen furnishing material for the construction of said county home, and taking from the contractor assignments of all moneys then due under said contract and in the hands of the owner.

From a judgment sustaining a demurrer interposed by the Commercial Casualty Insurance Company and dismissing the action, the plaintiff appeals, assigning error.

Bryan & Campbell for plaintiff.
Fuller, Reade & Fuller and S. Brown Shepherd for Casualty Co.

STACY, C. J. Let it be observed *in limine* that this is not a contest between the Murchison National Bank, a creditor of the contractor, and the surety company over the retained percentages in the hands of the owner, or the balance due the contractor and withheld under the contract. It is alleged that more than said balance was required to complete the contract after the failure and adjudication in bankruptcy of the contractor. Nor is it a case where moneys have been advanced for the payment of laborers and materialmen and assignments taken of

their claims against the contractor. *Trust Co. v. Porter,* 191 N. C., 672. Plaintiff, a lender of money to the contractor for use in carrying on the work of construction, is seeking to recover directly on the bond given by the contractor to the owner, with the Commercial Casualty Insurance Company as surety thereon, to insure the faithful performance of said contract, and conditioned as follows:

"Now, therefore, the condition of this obligation is such that if the principal shall faithfully perform the contract on his part, and satisfy all claims and demands incurred for the same, and shall fully indemnify and save harmless the owner from all costs and damages which it may suffer by reason of failure so to do, and shall fully reimburse and repay the owner all outlay and expense which the owner may incur in making good any such default, and shall pay all persons who have contracts directly with the principal for labor and material, then this obligation shall be null and void; otherwise it shall remain in full force and effect."

It is conceded that the provisions of C. S., 2445, requiring said bond to be conditioned "for the payment of all labor done on and materials and supplies furnished for the said work" are to be read into the bond and considered as if they had been written therein. *Electric Co. v. Deposit Co.,* 191 N. C., 653. Such is the requirement of the statute, the work being for a county home.

The plaintiff does not come within the class of persons protected by the statute, but it says the language of the bond is broad enough to include its claim, being, as it is, a lender of money to the contractor for use in carrying on the work of construction. *Aderholt v. Condon,* 189; N. C., 748; *Town of Cornelius v. Lampton, ibid.,* 714; *Title Guaranty and Surety Co. v. Coffman, Dobson & Co.,* 97 Wash., 211, 166 Pac., 620; *State Bank v. Gallucci,* 82 Wash., 445, 144 Pac., 698; *Shannon v. Abrams,* 98 Kan., 26, Ann. Cas. 1918 E, 502. It is not stipulated in the notes given by the contractor to the plaintiff that the moneys obtained thereon should be used in prosecuting this particular work, nor is it alleged by the plaintiff that all of said moneys were so used. The contractor was at liberty to use and did employ some of the funds borrowed from plaintiff for other purposes. Plaintiff alleges, however, that to the extent said moneys borrowed from it were used by the contractor in the prosecution of this particular work, it should be allowed to recover on the bond in suit. *Sumter Trust Co. v. Sumter County,* 134 S. E. (S. C.), 209. The action is bottomed solely upon the terms of the bond.

We do not think the language of the bond, by fair intendment, should be construed to include persons other than those intended to be pro-

tected by the statute. *Smiley v. State,* 60 Ind. App., 507, 110 N. E., 222. The words, "and satisfy all claims and demands incurred for the same," evidently refer to the claims and demands of those who, by law, are entitled to assert such claims and demands against the owner, or the surety under the statutory bond. *Amer. Sav. B. & T. Co. v. National S. Co.,* 104 Wash., 663. Indeed, in one clause of the bond it is sought to limit the claims of laborers and materialmen to such as "have contracts directly with the principal." This, of course, would be enlarged by the terms of the statute. *Electric Co. v. Deposit Co., supra.*

It is the general holding that a bank furnishing money to a contractor doing public work, for use in paying the claims of laborers and materialmen, without more, does not come within the protection of a statutory bond conditioned to pay all persons supplying the principal with labor or materials in the prosecution of his work. *Hardaway v. Nat. Surety Co.,* 211 U. S., 552; *United States for use of Fidelity Nat. Bank v. Rundle,* 107 Fed., 227, 52 L. R. A., 505.

The demurrer was properly sustained, but it was error to dismiss the action as against the contractor. He has been properly served, and the plaintiff is entitled to proceed in its action against him.

The costs of the appeal will be taxed against the plaintiff.

Modified and affirmed.

C. L. WILLIAMS, RECEIVER OF THE COMMERCIAL NATIONAL BANK OF WILMINGTON, v. EDGAR D. WILLIAMS.

(Filed 27 October, 1926.)

1. Descent and Distribution—Statutes—Husband and Wife—Banks and Banking—Counterclaim—Offset—Receivers—Deposits.

Where a husband is entitled to a child's distributive part in the personal property of his deceased wife, 3 C. S., 137(8), and she had a certain amount of money deposited in a bank since becoming insolvent and in a receiver's hands, he may not successfully set up this interest under the provisions of C. S., 521, as a counterclaim against his note, in an action by the receiver therein, until his wife's administrator has accounted for his trust or distributed the assets of his intestate's estate.

2. Same—Executors and Administrators.

Under the provisions of C. S., 521(2), allowing a counterclaim to be set up in an action arising on contract, matters arising also on contract between the parties, the subject of the counterclaim, must have existed at the time of bringing the action when this defense is relied upon.

3. Same—Insolvency.

Where a bank has become insolvent and in the hands of a receiver, the right of its debtor to successfully set up, as a counterclaim in an action by the receiver on his note, an interest in a deposit of his deceased wife he claims as a distributee under 3 C. S., 137(8), is governed by the conditions existing at the time of the insolvency of the bank.

APPEAL by defendant from *Daniels, J.*, at December Term, 1925, of NEW HANOVER.

Controversy without action on facts agreed. The plaintiff was appointed receiver on 1 February, 1923, and afterwards brought suit to recover the balance due on a note for $325, executed by the defendant and discounted at the Commercial National Bank of Wilmington. The note was listed as an asset in the hands of the receiver, and on 23 July, 1923, the defendant paid the bank $162.50 and directed that it be credited on the note. When the receiver was appointed the defendant had on deposit in the bank $2.74 and filed a verified proof of claim which was allowed as an offset against the note. At the time of the failure the defendant's wife had on deposit in the bank $895.12, for which she filed her proof of claim on 19 March, 1923. She died on 5 July, 1923, leaving surviving her the defendant and three children, one of whom qualified as her administrator on 21 February, 1924. On 8 August, 1924, her administrator collected and receipted for the first and only dividend on her deposit, amounting to $89.51. Mrs. Williams owed no debts and the funeral expenses were paid by her husband. Upon these facts judgment was rendered against the defendant for the balance due and he excepted and appealed. Affirmed.

H. Edmund Rogers for plaintiff.
Herbert McClammy for defendant.

ADAMS, J. In the statute of distributions it is provided that if a married woman die intestate leaving a husband and more than one child, the estate shall be distributed in equal portions and the husband shall receive a child's part. 3 C. S., 137(8). The parties admit that the only question for decision is whether upon the agreed facts the defendant has the right to pay his note out of his interest in his wife's deposit—whether he can offset such interest against the demand of the bank.

A counterclaim may arise out of one of the following causes of action: 1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. 2. In an action arising on contract, any other cause of action arising also on contract and existing

at the commencement of the action. C. S., 521(2). In *Smith v. French*, 141 N. C., 2, the Court said that "counterclaim" is broader in meaning than "set-off," "recoupment," or "cross-action," and includes them all, but that the counterclaim, if it arises under the second subdivision of the statute, must exist at the commencement of the action. There is nothing in the statement of facts showing that Mrs. Williams' administrator has rendered an account of his trust or distributed the assets of his intestate's estate. The defendant's "interest" as distributee is, therefore, not yet available to him, and as he has no control over it he cannot direct its application. In any event his "interest" would be subject to the limitation in the second subdivision of the statute; his alleged counterclaim did not exist at the commencement of the action. The right of set-off against the receiver of a bank is to be governed by conditions existing at the time of insolvency; and as against the receiver a debtor cannot set off a claim which is assigned to him after the bank becomes insolvent and the receiver is appointed. *Davis v. Mfg. Co.*, 114 N. C., 321; 7 C. J., 746, sec. 536.

The judgment is

Affirmed.

ROBINSON MANUFACTURING COMPANY ET AL. v. R. L. BLAYLOCK ET AL.

(Filed 27 October, 1926.)

1. Mechanics' Liens—Liens—Municipal Corporations—Cities and Towns—Pro Rata Distribution of Penalty of Bond—Rights of Surety—Contracts.

Where a municipal corporation has contracted for the erection of a public school building, and has on hand under the terms of the contract, a fifteen per cent reserve of its cost after making the monthly payments to the contractor, specified by the contract and the surety on the bond given in accordance with C. S., 2445, construed with the building contract, provides that the surety will be subrogated to the rights of the principal in the event of the contractor's default: *Held*, the surety company is entitled to the money thus reserved as against the laborers and material furnishers whose claims remain unpaid in full or in part, after the pro rata distribution of the money to the extent of the penalty of the bond which the surety has paid into court under the statutory provision.

2. Same—Equity—Subrogation—Contracts.

Laborers and material furnishers can acquire no liens on a municipal school building, and no right of equitable subrogation arises under the payment of the penalty fixed by the bond for distribution among them, but the surety may require, as against them, the payment to them by the municipality of the money still owing to the contractor, and in its hands,

according to the contract of suretyship by which they became bound, upon paying the penalty of the bond into court under the provisions of the statute, C. S., 2445, amended by the Public Laws of 1923, ch. 100.

3. Mechanics' Liens—Municipal Corporations—Cities and Towns—Schools—Principal and Surety—Contracts—Interpretation.

To determine the liability of the surety upon its bond given to a municipality for the contractor's performance of his contract to erect a public school building, the contract and the bond for which it is given must be construed together to effectuate its intent and purpose.

4. Mechanics' Liens—Municipal Corporations—Cities and Towns—Principal and Surety—Statutes—Bonds.

Laborers and material furnishers can acquire no liens upon a public school building erected by a municipal corporation, and the contractor's bond, given under the provisions of the statute, C. S., 2445, ch. 100, Public Laws of 1923, is given for their benefit in lieu of the right to acquire a lien thereon.

5. Equity—Subrogation.

Equitable subrogation cannot be successfully sought when the one to whose rights this equity is sought has no legal claim upon the subject-matter.

6. Equity—Principal and Surety—Subrogation—Payment of Principal's Debt.

Where the equitable right of subrogation arises to the surety on a contractor's bond for the erection of a public school building by a municipality, it is required that the debt be paid in full.

7. Mechanics' Liens—Cities and Towns—Municipal Corporations—Principal and Surety—Extent of Surety's Liability—Interest.

The surety on the contractor's bond for the erection of a public building, is only liable for the amount of the penalty of the bond, and upon notification of the contractor's default or demand of payment by special contract, this amount so fixed may inure to the benefit of the surety, though the amount of the penalty may be inadequate to pay the claims of laborers and material furnishers for the building.

APPEAL by plaintiffs and county board of education from *Bond, J.*, at June Term, 1926, of LENOIR.

Civil action to recover for materials furnished by plaintiffs and used by the contractor in the construction of a public school building.

From a judgment in favor of the American Surety Company, rendered on facts agreed, a jury trial being waived, the plaintiffs and the defendant, board of education of Lenoir County, appeal, assigning errors.

Dickinson & Freeman and F. E. Wallace for plaintiffs.
Cowper, Whitaker & Allen for Board of Education.
Stewart, McRae & Bobbitt for American Surety Company.

Stacy, C. J. On 12 July, 1924, R. L. Blaylock, contractor, entered into a written agreement with the board of education of Lenoir County for the erection of a public school building at Moss Hill, N. C., in which it was stipulated, among other things, that, in consideration of the sum of $26,316.00, payable up to 85% of the contract price in monthly installments on estimates of the architect, with 15% to be retained and held until the completion of the building, "the contractor shall and will provide all materials and perform all the work" necessary for the erection of said school building; and on the same day, for a valuable consideration, the board of education of Lenoir County took from the contractor, as principal, and the American Surety Company, as surety, a bond of indemnity in the sum of $4,579.00 to "indemnify the obligee against any loss or damage directly arising by reason of the failure of the principal faithfully to perform said contract," etc.

On 18 February, 1925, the contractor defaulted, having received prior to that time $22,244.84 of the contract price for work on said building. Thereafter the board of education, on order of the bonding company, expended $277.41 for the completion of the building, leaving a balance of $3,716.06 due under the contract, and held by the school board as the 15% retained percentage.

At the time of default by the contractor, claims for work done on and materials furnished for said building, amounting to $8,284.96, were outstanding and unpaid.

On 28 April, 1926, the surety paid into court the sum of $4,579.00, the full penalty of its bond (unless it be liable for interest thereon), for distribution *pro rata* among the laborers and materialmen as provided by the statute.

The American Surety Company now contends that the retained percentage, amounting to $3,716.06, in the hands of the board of education of Lenoir County, should be turned over to it by reason of its contract of suretyship which contains, *inter alia*, a stipulation to the effect that in case of default by the contractor, the surety "shall also be subrogated to all of the rights of the principal; and any and all moneys or property that may at the time of such default be due, or that thereafter may become due to the principal under said contract, shall be credited upon any claim which the obligee may then or thereafter have against the surety, and the surplus, if any, applied as the surety may direct."

The plaintiffs, on the other hand, contend that said amount should be applied to the payment of their claims, being, as they are, laborers and materialmen. The appeal presents the single question as to who is entitled to this fund. The trial court held that it should be paid to the

American Surety Company. We think the judgment is correct, and that it must be affirmed.

It is conceded by all the parties that the bond executed by R. L. Blaylock and the American Surety Company was taken and given in view of the provisions of C. S., 2445, as amended by chapter 100, Public Laws 1923, requiring every county, city, town or other municipal corporation, which lets a contract for building, repairing or altering any building, public road or street, to take from the contractor of such work (when the contract price exceeds $500) a bond, with one or more solvent sureties, before beginning any work under the contract, payable to said county, city, town or other municipal corporation, and conditioned "for the payment of all labor done on and materials and supplies furnished for the said work," and upon which suit may be brought for the benefit of laborers and materialmen having claims. *Warner v. Halyburton,* 187 N. C., 414.

The statute, as amended, provides that every bond given to any county, city, town or other municipal corporation, for the building, repairing or altering of any public building, public road or street, as required by this section, "shall be conclusively presumed to have been given in accordance therewith, whether such bond be so drawn as to conform to the statute or not, and this statute shall be conclusively presumed to have been written into every such bond so given." The amount of the bond is to be equal to the contract price when over five hundred and not more than two thousand dollars; when the contract price is between two and ten thousand dollars, the amount is to be determined by adding to two thousand dollars, thirty-five per cent of the excess of the contract price over two thousand dollars; and when the contract price is over ten thousand dollars, the amount of the bond is required to be two thousand dollars plus twenty-five per cent of the excess of the contract price over the sum of two thousand dollars. It is further provided in the amended law that only one action may be brought on such bond, all claimants to be duly notified, which was done in the instant case, and if the aggregate sum exceed the amount of the bond, the payments are to be prorated. "If the recovery on the bond shall be inadequate to pay the amounts found due to all the claimants, judgment shall be given to each claimant *pro rata* of the amount of the recovery."

The surety is also allowed, by paying into court in such suit the full amount of the penalty of the bond, to be relieved from any other or further liability thereon. *Electric Co. v. Deposit Co.,* 191 N. C., 653.

The principle is well established by many authoritative decisions, here and elsewhere, that in determining the surety's liability to third persons, on a bond given for their benefit and to secure the faithful per-

formance of a building contract as it relates to them, the contract and bond are to be construed together. *Mfg. Co. v. Andrews,* 165 N. C., 285. The obligation of the bond is to be read in the light of the contract it is given to secure, and ordinarily the extent of the engagement, entered into by the surety, is to be measured by the terms of the principal's agreement. *Brick Co. v. Gentry,* 191 N. C., 636, and cases there cited.

It is stipulated in the present bond that "this bond is subject to the provisions of section 2445 of the Revised Statutes of North Carolina and amendments thereto." The right of the laborers and materialmen to recover on said bond is conceded, and it has been paid in full. The contest is over the retained percentages withheld under the contract and now in the hands of the owner.

In this connection, it may be well to bear in mind the distinction between the remedies afforded and intended to be afforded by the present statute, being applicable, as it is, to public works, and those given by the lien statutes which apply only to private works of a similar nature. *Noland Co. v. Trustees,* 190 N. C., 250.

C. S., 2437, one of the lien statutes, in terms provides that all subcontractors and laborers who are employed to furnish, or who do furnish, labor or material for the building, repairing or altering of any house or other improvement on real estate, shall have a lien on said house and real estate for the amount of such labor done or material furnished, when notice thereof has been given as required by law; "but the sum total of all the liens due subcontractors and materialmen shall not exceed the amount due the original contractor at the time of notice given." *Supply Co. v. Eastern Star Home,* 163 N. C., 513.

The policy of the lien law is to protect subcontractors and laborers against loss for labor done and materials furnished in building, repairing or altering any house or other improvement on real estate, to the extent of the balance due the original contractor at the time of notice to the owner of claims therefor, but it is not provided that the owner shall be liable in excess of the contract price, unless he continue to pay after notice of claim from the subcontractor or laborer, and then only to the extent of such payments after notice. "After such notice is given, no payment to the contractor shall be a credit on or discharge of the lien herein provided." C. S., 2438.

Where the original contractor has been paid in advance, or the owner has settled with him in full prior to notice of any claim from a laborer or materialman for work done or material furnished and not paid for, there is no provision in any of the lien statutes whereby a subcontractor or laborer may acquire a lien against the property, or sue the owner for the value of such claim. *Rose v. Davis,* 188 N. C., 355. Liens are

given to subcontractors and those who furnish labor, materials and supplies, to the end that they may force collection from their debtor, the original contractor, and not for the purpose of rendering the owner primarily liable for such claims, except where proper notice has been given before settlement with the contractor. *Mfg. Co. v. Andrews, supra.*

But in the statute now under consideration, C. S., 2445, passed as a partial substitute for the lien statutes in an effort to place public construction somewhat on a parity with private work of a similar kind, and by virtue of which it is conceded the present bond was taken and given to insure the faithful performance of the building contract on the part of R. L. Blaylock, there is no provision whereby the owner may withhold funds belonging to the contractor upon notice from a laborer or materialman that the work done or material furnished by him to the contractor has not been paid for; nor would the owner be justified in withholding funds due the contractor upon receipt of such notice. The contract of the laborer or materialman is with the contractor, and in the absence of agreement or statutory provision allowing it, the owner would not be relieved, even *pro tanto,* of its obligation to the contractor by paying one or more of those who work for or furnish materials to the contractor. An obiter suggestion to the contrary, made in *Scheflow v. Pierce,* 176 N. C., p. 93, was disapproved in *Noland Co. v. Trustees,* 190 N. C., p. 253.

In *Hutchinson v. Comrs.,* 172 N. C., 844, the board of commissioners of Iredell County, upon notice duly received, paid to a subcontractor (Lon G. Crouse Company) its claim for painting a county home out of funds retained and due the original contractor at the time notice was received. In a suit by the receiver of the original contractor against the board of commissioners to recover the balance due under the building contract, it was held that, as the subcontractor acquired no lien on a public building, and the notice given by it imposed no obligation on the commissioners with reference to the amount due the original contractor, such payment was made by the defendant, board of commissioners, on its own motion, when under no duty to do so, and that the amount so paid could not be allowed as a credit against the balance due the original contractor.

The lien statutes, therefore, may be put aside as inapplicable, as no lien can be acquired on a public building. *Noland Co. v. Trustees, supra; Snow v. Comrs.,* 112 N. C., 336. And where the property is not subject to a lien, as here, no duty or obligation is imposed upon the owner or principal contractor by virtue of any notice or attempt to acquire a lien thereon. *Foundry Co. v. Aluminum Co.,* 172 N. C., p. 707; *Hall v. Jones,* 151 N. C., 419.

The equitable lien theory with respect to claims of laborers and materialmen has not been recognized in this jurisdiction. They are protected by statutory liens and bonds. Animadverting on the subject in *In re Fowble,* 213 Fed., 676, *District Judge Rose* said:

"Most men feel that one who has contributed to the creation of anything of value stands in a peculiar relation to it. He has a special claim to be paid out of it. The mechanic and other lien laws of so many jurisdictions are the expression of that conviction. The courts, however, have not seen their way clear to make it a generally applicable principle of equitable jurisprudence. It has had its part in shaping many a rule administered in chancery, but complete recognition has been withheld from it. The difficulty, in many, if not in most cases the impossibility, of accurately and justly defining its limits have amply justified the hesitation of the courts. If mechanic's lien laws prove the strength of its appeal to an instinctive sense of natural justice, they demonstrate that it is usually impossible to apply it beyond the limits to which the statutes go."

The right of the plaintiffs, laborers and materialmen, to insist on having the retained percentages, now in the hands of the owner, applied to the payment of their claims must rest upon contract rather than upon any statutory lien; just as the American Surety Company claims said fund by right of contract.

It is settled by the decisions that, as no lien can be secured or enforced against a public building, the laborers and materialmen have no claim on the funds retained in the hands of the owner, either by statutory or equitable lien. *Henningsen v. U. S. Fidelity Co.,* 208 U. S., 404; *Trust Co. v. Construction Co.,* 191 N. C., 664. The surety, therefore, upon the payment of the claims of the laborers and materialmen, it would seem, could take no lien on said funds by way of subrogation or substitution. *Pratt Lumber Co. v. Gill & Co.,* 278 Fed., 783. This is well illustrated by the case of *American Surety Co. v. Finletter,* 274 Fed., 152, where the question is ably discussed from a number of viewpoints, with the following as one of the conclusions announced: "In this state of the law—laborers and materialmen having no rights to reserved percentages—there were, as to them, no rights to which the Surety Company could be subrogated. Likewise, Peoples Brothers, Inc. (contractor), had no rights in the fund to which the Surety Company could be subrogated. Obviously, there was no right of subrogation anywhere."

Especially is this so where the claims have not been paid in full. Subrogation is a creature of equity and is never allowed, as against a creditor, until the whole debt is paid. A *pro tanto* substitution or subrogation is not permitted. *Maryland Casualty Co. v. Fouts,* 11 Fed.

(2nd series), 71. "Unless the surety pays the debt in full, he is not entitled to subrogation"—*Thompson, District Judge,* in *Peoples v. Peoples Bros.,* 254 Fed., 489.

Suppose no bond had been given at all, Would the plaintiffs, in that case, be entitled to have the retained percentages applied to the payment of their claims? We think not. The contractor alone would be entitled to receive them. *Hutchinson v. Comrs., supra.* And what would be the status of the bond if the owner had not retained the 15% as provided by the contract? The surety would be discharged, *pro tanto* at least, certainly so far as the rights of the owner are concerned. *Prairie State Nat. Bank v. United States,* 164 U. S., 227; *Finney v. Condon,* 86 Ill., 78; Brandt on Suretyship (3 ed.), sec. 439. Speaking to the question in *St. Peter's Catholic Church v. Vannote,* 66 N. J. Eq., 78, *Vice-Chancellor Reed* said: "Now, the twenty per cent was retained as indemnity against failure by the contractors to entirely execute the contract. As against the sureties, the owner was bound to so retain it (the contract so providing), else he would have *pro tanto* discharged the sureties from their obligations to answer the default of the contractors."

Here, retention by the owner of 15% of the contract price until the completion of the building is expressly made a condition precedent to any right to recover on said bond. *Ins. Co. v. Durham County,* 190 N. C., 58.

It should be remembered that the plaintiffs have received, or will receive, their *pro rata* part of the full penalty of the bond which was given for their protection, and the rentention of 15% of the contract price is one of the terms upon which the bond was given. *Neilson v. Title Guaranty & S. Co.,* 81 Or., 422, 159 Pac., 1151. This was part of the consideration moving to the bonding company. It is now seeking to recover on its contract.

While the surety may have no claim to the reserved percentages by way of subrogation or equitable lien, the rationale of our decisions is to the effect that, under conditions like the present, the surety has a contractual right, measured by the terms of the contract and bond, to have such reserved percentages applied to the exoneration of the loss sustained by the contractor's failure to pay the claims of laborers and materialmen. Speaking to the question in *Gastonia v. Engineering Co.,* 131 N. C., 359, *Clark, J.,* said: "Besides, the American Surety Company, having become surety to the engineering company for the faithful performance of said contract, upon any default of its principal by which it became liable on said bond, if it did not become subrogated to the rights of its principal in this fund, it is at least entitled to have it applied to the payment of these claims for materials, in exoneration of its liability therefor. *Patton v. Carr,* 117 N. C., 176."

In *Wells v. City of Philadelphia,* 270 Pa., 42, 112 Atl., 867, the same position is expressed as follows: "It was not a new engagement, but a continuation of the old one, wherein the surety succeeded to all the rights of the contractor under the contract, as well as liabilities to the owner thereunder. As to any money retained, the surety then stands to that fund in the same position as the owner of the property to which the contract relates. The surety's relation, through compulsion (default), dates even with the owner's relation. From this fund and the unpaid contract price it is entitled to sufficient to save itself from loss on its suretyship engagement; nor can the contractor, by assignment or otherwise, deprive it of this right."

The authorities sustain the right of the surety to have the retained percentages, provided for in the contract, applied to the exoneration of loss occasioned by default of the contractor. As said by *District Judge Connor* in *Pratt Lumber Co. v. T. H. Gill Co.,* 278 Fed., 783, after an exhaustive investigation of the subject: "It would seem that the better view is that expressed in several of the best-considered cases—that the surety acquires a contractual right, measured by the terms of the contract, between the owner of the property and the contractor, which entitles him to the benefit of such provisions as inure to the protection of the owner, subject of course to his primary right, and reduces the liability of the surety against loss or damage by the default of the contractor. The language quoted by *Judge White* in the *Prairie State Bank case* from a number of English and American courts tends strongly to sustain this principle upon which the right of the surety rests."

The case is an unusual one in that the work was practically finished at the time of default by the contractor, and only a small amount of the retained percentages in the hands of the owner at that time was required for the completion of the building. It is clear, we think, that the balance of the retained percentages in the hands of the owner must be paid to the American Surety Company. This reserved fund is as much for the indemnity of the surety as it is for the security of the owner, and upon the payment of the bond the surety is entitled to the sum still remaining of the fund retained for its benefit. *Prairie State Nat. Bank v. United States,* 164 U. S., 227; *Wasco County v. Ins. Co.,* 74 L. R. A. (N. S.), 732, and note. See, also, *Hall v. Terra Cotta Co.,* 97 Kan., 103, as reported in Ann. Cas., 1918D, with valuable note covering the whole subject.

The apparent hardship of the case arises from the fact that the bond given by the contractor and taken by the board of education for the benefit of the laborers and materialmen is not large enough, or it is

not as large as contemplated by the statute, but this is a deficiency which the courts are not able to supply. *Nolan Co. v. Trustees, supra.*

His Honor correctly held that the liability of the American Surety Company on its bond would not exceed the maximum penal sum of $4,579.00, which has been paid into court. *S. v. Martin,* 188 N. C., 119.

According to the modern weight of authority in other jurisdictions, the general rule seems to be that although the penalty of the bond fixes the limit of liability of the surety at the time liability arises thereunder, yet, if the principal or surety fail to discharge that liability when it matures, interest may be allowed on the amount from the time the liability accrues, even if the amount of recovery exceed the penalty named in the bond. 22 R. C. L., 518. As against the sureties, however, interest is allowed only from the date of notice to them of the breach, or from the date of a demand on them to make good such breach. *Dickinson v. White,* 25 N. D., 523; 143 N. W., 754; 49 L. R. A. (N. S.), 362. See valuable note to *Griffith v. Rundle,* 23 Wash., 453, as reported in 55 L. R. A., 381, where the rule is stated, with citation of authorities; and see, also, dissenting opinion of *Clark, J.,* in *Machine Co. v. Seago,* 128 N. C., p. 162. But in North Carolina, both by statute and judicial decision, the surety's liability may not exceed the penalty of the bond until judgment has been rendered against the surety. Interest may then be collected on said judgment without regard to the limit of liability named in the bond, because the nature of the demand is altered by the judgment, and under the statute such judgment would bear interest at the rate of 6 per cent per annum until paid. C. S., 2309; *Warden v. Nielson,* 5 N. C., 275; *Moseley v. Johnson,* 144 N. C., 274; *Bernhardt v. Dutton,* 146 N. C., 206; *Machine Co. v. Seago, supra.*

After a careful and painstaking investigation of the questions presented by the appeal, we are constrained to believe that the case has been correctly decided.

Affirmed.

C. G. KEEBLE, TRUSTEE OF P. R. ASHBY, BANKRUPT, v. FIDELITY AND DEPOSIT COMPANY OF BALTIMORE ET AL.

(Filed 27 October, 1926.)

(For digest see *Robinson Manufacturing Co. v. R. L. Blaylock et al., ante,* 407.)

APPEAL by plaintiff from *Barnhill, J.,* at March Term, 1926, of WAKE.

KEEBLE *v.* DEPOSIT CO.

Civil action to recover balance alleged to be due under a road construction contract.

From a judgment in favor of the Fidelity and Deposit Company of Baltimore, Maryland, rendered on facts agreed, a jury trial having been waived, the plaintiff appeals, assigning error.

J. C. Little for plaintiff.
S. Brown Shepherd for Fidelity and Deposit Co.

STACY, C. J. The controlling facts are as follows:

1. In December, 1921, P. R. Ashby, contractor, entered into a contract with the State Highway Commission of North Carolina to build a road in Wilson County, known as Project No. 291.

2. The Fidelity and Deposit Company of Baltimore, Maryland (hereafter called the surety), became surety on the contract bond and thereby obligated itself, among other things, to save the State Highway Commission harmless from "any and all claims of persons furnishing material or performing labor in and about the construction of said roadway," etc.

3. The actual work of construction had been completed, or practically so, but with many claims for labor and material unpaid, on 4 January, 1924, when the contractor was adjudged a bankrupt and the plaintiff herein appointed trustee in bankruptcy as provided by law.

4. On default by the contractor, the surety was compelled, under the terms of its bond, to pay the claims of laborers and materialmen, amounting to more than $9,000.00.

5. At the time of the adjudication in bankruptcy, the State Highway Commission had in its hands, under the provisions of the construction contract, retained percentages of the contractor's account, amounting to $8,098.92.

6. These retained percentages had been duly assigned to the surety at the time of the execution of the surety bond.

Upon these, the facts chiefly pertinent, the appeal presents the single question as to whether the aforesaid retained percentages should be paid to the trustee in bankruptcy for distribution among the general creditors of the bankrupt, or to the surety, under and by virtue of the terms of its contract and bond.

The judgment awarding the sum to the surety must be affirmed on authority of *Robinson Mfg. Co. v. Blaylock et al., ante,* 407.

Affirmed.

H. P. MOORE, R. L. MOORE AND M. L. MOORE, COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF MOORE BROTHERS, v. BUILDERS MATERIAL COMPANY, A CORPORATION, W. P. ROSE, AND THE NATIONAL SURETY COMPANY, A CORPORATION.

(Filed 27 October, 1926.)

1. Mechanics Liens—Municipal Corporations—Cities and Towns—Surety Bonds—Statutes.

Where a surety company has executed a bond for a contractor to erect a municipal building under the provisions of C. S., 2445, before the amendment by chapter 100, Public Laws of 1923, conditioned among other things for the general contractor to pay for all labor done and material and supplies furnished for the work: *Held*, a sub-contractor's thirty-day note given for materials furnished and actually used in the building, is not a waiver by plaintiffs who furnished the material, and falls within the liability assumed by the surety.

APPEAL by plaintiffs from *Barnhill, J.*, at February Term, 1926, of WILSON. Reversed.

The facts are stated in the opinion.

Connor & Hill for plaintiffs.

Kenneth C. Royall and W. A. Finch for defendants, W. P. Rose and National Surety Company.

CLARKSON, J. The plaintiffs are copartners; the Builders Material Company was a corporation, and since the institution of this action, has been adjudged bankrupt; the National Surety Company is a corporation organized under the laws of the State of New York, engaged in the business of becoming surety for other persons, and is authorized to do business in North Carolina.

That on or about 1 December, 1921, W. P. Rose entered into a contract with the board of trustees of the Wilson graded schools for the erection and completion of a high school building, at a price exceeding $200,000, and that under the terms of the contract, W. P. Rose was to furnish and pay for all materials, supplies and labor necessary for the erection and completion of the building.

That on or about 16 December, 1921, the said W. P. Rose, pursuant to the contract, as principal, with the National Surety Company as surety, executed and delivered unto the board of trustees of the Wilson graded school, a bond in the sum of $90,101.00, containing, among other things, the following:

"Now, therefore, the condition of this obligation is such that if the principal shall faithfully perform the contract on his part, and satisfy all claims and demands, incurred for the same, and shall fully indemnify and save harmless the owner from all cost and damage which he may suffer by reason of failure so to do, and shall fully reimburse and repay the owner all outlay and expense which the owner may incur in making good any such default, *and shall well and truly pay for all labor done and material and supplies furnished for the said work*, as is required of contractors and their bondsmen by section 2445 of the Consolidated Statutes of North Carolina, it being the intent and purpose of this obligation to comply with the provisions of said section."

That prior to 26 June, 1922, W. P. Rose entered into a contract with the Builders Material Company, Inc., for the purchase of certain material and other building materials to be used and which was used in the erection and construction of the said school building, making what is usually called a sub-contract.

That after W. P. Rose and the Builders Material Company, Inc., entered into the contract referred to, the Builders Material Company, Inc., purchased a portion of the materials called for in said contract from Moore Brothers, the plaintiffs herein, and the said Moore Brothers delivered the said materials to the Builders Material Company, who delivered them to W. P. Rose, and the same were used in and about the construction of the said school building.

The materials which were sold to W. P. Rose by the Builders Material Company, Inc., and which the plaintiffs, Moore Brothers, furnished, were doors, windows, door frames and window frames and similar materials, which were made according to the plans and specifications of the school building and were made for the purpose of being used therein.

That on or about 26 May, 1922, the Builders Material Company, Inc., as an evidence of a part of the sum due Moore Brothers for the said materials, executed and delivered unto Moore Brothers a note in the sum of $1,664.88, due thirty days from date. That there is now due Moore Brothers on account of the note the sum of $1,664.88, with interest from 26 May, 1922, subject to a credit of $83.54 as of 15 December, 1925, the same being the dividend by the trustee in bankruptcy of the Builders Material Company.

W. P. Rose paid the Builders Material Company for the materials furnished to the Builders Material Company by Moore Brothers, and which is the subject of this action, and which were used in the construction of the school building before he, W. P. Rose, had any notice that Moore Brothers had sold and furnished the said materials to the Builders Material Company.

In regard to the motion to dismiss made by defendants, we can see no merit, under the facts and circumstances of this case.

This action was commenced before C. S., 2445 was amended by Public Laws 1923, ch. 100. C. S., 2445, in part, is as follows: "Every county, city, town or other municipal corporation which lets a contract for the building, repairing or altering any building, public road, or street, shall require the contractor for such work (when the contract price exceeds five hundred dollars) to execute bond with one or more solvent sureties before beginning any work under said contract, payable to said county, city, town or other municipal corporation, *and conditioned for the payment of all labor done on and material and supplies furnished for the said work,*" etc.

As the amendment is important, we give it:

"Section 1. That section two thousand four hundred and forty-five of the Consolidated Statutes be amended by adding thereto the following: Every bond given by any contractor to any county, city, town or other municipal corporation for the building, repairing or altering of any building, public road or street, as required by this section, shall be conclusively presumed to have been given in accordance therewith, whether such bond be so drawn as to conform to the statute or not, and this statute shall be conclusively presumed to have been written into every such bond so given.

Sec. 2. Only one action or suit may be brought upon such bond, which said suit or action shall be brought in the county in which the buildings, road or street is located, and not elsewhere. In all suits instituted under the provisions of this statute, the plaintiff or plaintiffs shall give notice to all persons, informing them of the pendency of the suit, the name of the parties, with a brief recital of the purposes of the action, which said notice shall be published at least once a week for four successive weeks in some newspaper published and circulating in the county in which the action is brought, and if there be no newspaper, then by posting at the courthouse door and three other public places in such county for thirty days. Proof of such service shall be made by affidavit as provided in case of the service of summons by publication. All persons entitled to bring and prosecute an action upon the bond shall have the right to intervene in said action, set up their respective claims, provided that such intervention shall be made within twelve months from the bringing of the action, and not later. If the recovery on the bond shall be inadequate to pay the amounts found due to all of the claimants, judgment shall be given to each claimant *pro rata* of the amount of the recovery. The surety on such bond may pay into court for distribution among the claimants the full amount of his lia-

bility, to wit, the penalty named in the bond, and upon so doing, such surety shall be relieved from further liability.

Sec. 3. This act shall not affect pending suits and litigation."

The present action was pending when the above amendment was passed.

Defendants contend that a thirty-day note was accepted by plaintiffs from the Builders Material Company, Inc., and the note was proved in bankruptcy, and the note constituted a payment. We cannot so hold. The acceptance of the note alone is not sufficient to effect a waiver of the right of plaintiffs, in the absence of an agreement to that effect. *Lumber Co. v. Trading Co.,* 163 N. C., p. 314. In *Electric Co. v. Deposit Co.,* 191 N. C., p. 658, a ninety-day trade acceptance was held not a bar to the right to recover on the bond.

We think the instant action is similar to and governed by the case of *Electric Co. v. Deposit Co., supra,* although in that case it is said: "There is evidence tending to show that the general contractor, as well as the supervising architect, had knowledge or were advised, though not formally notified, of the fact that the plaintiff was supplying the Wells Electric Company with certain materials for use in executing its part of the work." The decision is carefully written by *Stacy, C. J.,* and sustained by a wealth of authorities. The decision is not based on notice, but the *Chief Justice* well says: "In the instant case the general contractor agreed to provide 'all the material and perform all the work,' required for the erection of the building, and to 'pay for all labor done on, and all material and supplies furnished for said work.' These provisions, read in the light of the statute, look to the protection of those who furnish the labor and materials provided for in the contract, and not to the particular contract or engagement under which they are supplied. If the general contractor sees fit to let a portion of the work to a subcontractor, who employs labor and buys materials which are used to carry out and fulfill the engagement of the original contractor, the principal contractor is thereby furnished with the labor and materials for the fulfillment of his engagement as effectively as he would have been had he directly hired the labor or bought the materials."

It may be stated that the defendants have no reason to complain. The Supreme Court of the United States held years ago, in *Hill v. Am. Surety Co.,* 200 U. S., 187 (decided 2 January, 1906), opinion written by *Mr. Justice Day,* in a similar case, that the Surety Company was liable. Numerous other decisions in the different states in the Union are to the same effect. Defendant Surety Company wrote the bond and took the premiums no doubt aware of these decisions. It is presumed that the defendant Rose, contractor, knew the law.

There is no hardship for the contractor to obtain from the subcontractor bills for all labor done on and all materials and supplies furnished for the work before he pays the subcontractor, for he knows his bond covers these accounts.

The plaintiffs furnished doors, windows, door-frames and window-frames and similar materials which were made according to the plans and specifications of the school building and were made for the purpose of being used therein, and the materials were furnished for the said work by plaintiffs and *were actually used* in the school building. In *Gravel Co. v. Casualty Co.*, 191 N. C., p. 313, *Brogden, J.*, ably discusses the liability whether the material is actually used or not and in that case it is held that where the contractor ordered and the materials were supplied for the work, but not actually used therein, is within the contractor's bond conditioned on payment for all material for which the contractor is liable. At p. 318: "Indeed, if any other rule of liability should be applied, materialmen would be compelled to stand over materials furnished and compel the contractor to incorporate them in the work in order to collect the purchase price. The logical result of such a rule would be to undermine and destroy business confidence and security."

For the reasons given the judgment below is

Reversed.

ETTA JORDAN CROCKER ET AL. v. JOHN E. VANN, EXECUTOR, ET AL.

(Filed 27 October, 1926.)

1. **Tenants in Common—Sale for Division—Payment of Purchase Price—Title—Courts—Judgments—Deeds and Conveyances—Statutes.**

Where, under a petition of tenants in common, lands are sold for division under the provisions of C. S., 3241, title to the lands held in common will not pass to the purchaser until the purchase price has been paid, and a deed executed to the purchaser by the one appointed to sell under the order of the Court.

2. **Same—Husband and Wife—Estates by Entireties—Judgments—Resulting Trusts—Deeds and Conveyances—Probate—Statutes.**

Where the wife alone is entitled to a deed in the severance of her interest as a tenant in common of lands sold for division, under C. S., 3241, and in proceedings thereunder it is erroneously adjudged by the court that the deed be made to her and her husband by entireties, the title will inure only to her under a resulting trust, and the husband cannot acquire by survivorship: *Held, further*, that as such transaction falls

within the intent and meaning of C. S., 2515, the special formalities of probate of a conveyance between husband and wife for him to acquire her title, would be lacking.

3. **Same—Color of Title—Adverse Possession—Title—Contract to Purchase.**

Color of title for the wife's separate estate in lands, that will ripen title by adverse possession in those claiming under the husband by survivorship, cannot be acquired under a consent judgment conditioned upon the future payment of the purchase price in proceedings under C. S., 3241.

4. **Same—Judgment—Estoppel.**

In proceedings in dissolution of a partnership between the husband, who has no right of survivorship in his wife's lands and another, it has been determined by judgment of the Court, that the partnership had purchased only the interest of the husband in the estate of his wife, held by her in common with others, the question of the wife's title to the lands is not determined, and the doctrine of estoppel does not apply.

5. **Same—Judgment—Color of Title—Partnership—Assets.**

Where, in the dissolution of a partnership upon the death of one of its members, it has been adjudged by the Court that the assets of the firm consisted in part of whatever interest the deceased husband may have had in certain lands his wife held in common with others, and it is made to appear that the husband had no such interest therein, such judgment may not be considered as color of title that will ripen the title under adverse possession.

6. **Husband and Wife—Jus Accrescendi—Evidence—Questions for Jury.**

Where there is conflicting legal evidence as to whether or not the right of survivorship of the husband vested in him the title to lands held by him and his wife by entireties, an issue is raised for the determination of the jury.

7. **Judgments—Estoppel—Parties.**

Estoppel by judgment does not apply as against the rights of those who were not made parties to the action.

CIVIL ACTION, before *Sinclair, J.*, at December Term, 1925, of HERTFORD.

The lands in controversy were originally conveyed to Joseph Jordan, John Jordan, William Jordan and Martha W. Jordan, who married A. I. Parker prior to 1873. The deeds made subsequent to 1873 were made to Joseph Jordan, John Jordan, William Jordan and Martha W. Parker. The family lived together as one family and operated a hotel and carried on certain farming operations until about the year 1884, when Joseph Jordan married and moved away. Thereafter, six partition proceedings were brought to partition the land above referred to. These proceedings were brought in the name of William Jordan, A. I. Parker and wife, Martha W. Parker, *v.* J. J. Jordan. John Jordan,

the other tenant in common, died without issue and his share descended to his brothers and sister. Orders of sale were duly made by the clerk, directing a sale of all the land embraced in the six special proceedings and a division of the proceeds among the parties entitled thereto according to law. W. P. Shaw was appointed commissioner of the court to make the sale. The commissioner advertised the land and set the sale on 4 August, 1884. On that day the parties entered into a written contract as follows, to wit: "In the matter of the sale of real estate advertised to be sold this day by W. P. Shaw, commissioner, the parties agree as follows:

"A. I. Parker, Mrs. Martha W. Parker and William Jordan shall become the purchasers of the following lots, being the whole property advertised by the said Shaw:

"The Old Town Farm, the Winton Ferry, jail lots in Winton, courthouse lots, Northcott lot, hotel square, stable lots, Riddick land and wharf property in Winton, at the aggregate sum of $18,000, as the value of the whole; and in order to determine the value of the separate parcels above mentioned, upon the basis of $18,000 for the whole, the appraisers shall be selected—one by J. J. Jordan, one by the parties hereto, and the third by the two appraisers selected as aforesaid. The property shall be reported by the said Shaw to the court as sold to the above-named parties at the sum of $18,000 at the sums named by the said appraisers for the respective parcels and shall by consent be confirmed by the court and the parties respectively bind themselves, each to the other in the sum of one thousand dollars, that they will keep and perform the agreement fully and faithfully.

"It is further agreed, that all the stock, farming utensils and crops at the Old Town and the growing crops on any of said land plantation, except one mule called 'Bet,' is to become the property of the said A. I. Parker, Martha W. Parker, and William Jordan, and the said mule Bet shall become the property of the said J. J. Jordan. Neither party to be charged anything for said property.

"It is further understood and agreed that the rights of the respective parties hereto in the fund arising from said sale shall be in no way affected by this agreement, but each shall have the right to contest before the courts, as to his interest in the fund, arising from the sale of said land or any part thereof, as if this agreement had not been made and signed.

"The purchasers are to pay six per cent interest upon their said purchase and are to pay over to J. J. Jordan the share to which he may be found entitled by 1 January, 1885. A. I. Parker, (Seal), Martha W. Parker, (Seal), William Jordan, (Seal), John Jordan, (Seal), J. J. Jordan, (Seal). 4 August, 1884. Witness: W. D. Pruden."

"On 20 October, 1884, the commissioner, W. P. Shaw, reported the sale to the court, stating in substance that on the day of the sale the parties had entered into a private agreement wherein it was stipulated that A. I. Parker, Martha W. Parker and William Jordan should become the purchasers of the property for $18,000.00, and that 'the property described in the complaints sold for the sum of $18,000.00 in the way in which the sale is heretofore explained.'

"J. J. Jordan died in 1890, leaving him surviving a widow, Mary Jordan, and Etta Jordan and Bettie Picot, his only children and heirs at law. Etta Jordan, daughter of J. J. Jordan, afterwards married Bernard Crocker, and is plaintiff in this action. John E. Vann and P. B. Picot were appointed administrators of J. J. Jordan.

"Nothing further was done in the matter until April, 1891, when Vann and Picot, administrators of J. J. Jordan, made a motion in the cause in each of the special proceedings, praying for a guardian *ad litem* for Etta Jordan and Bettie Picot, minor children of J. J. Jordan, deceased, and further requesting a confirmation of the sale of the property by W. P. Shaw, commissioner, in accordance with his report of 20 October, 1884. On 13 November, 1891, the clerk of the Superior Court confirmed the sale in each of said special proceedings and directed in each decree of confirmation that the commissioner "proceed to collect so much of said purchase money as is due to the administrators of said J. J. Jordan, and upon payment thereof to make title to the purchasers."

At this stage of the proceedings, all parties were brought in and there were various contentions and controversies involving the partnership business of Jordan & Parker, which are not pertinent to the decision of this case. Finally, at the Spring Term, 1893, of the Superior Court of Hertford County, the following judgment was entered:

"Wm. Jordan, A. I. Parker and wife, Martha W. Parker, *v.* J. J. Jordan and wife, Mary E. Jordan, Bettie Picot, Etta Jordan and G. H. Mitchell, her guardian *ad litem* and John E. Vann as surviving administrator of J. J. Jordan.

"It appearing to the satisfaction of the court that cases on the civil issue docket of this Court for the Spring Term, 1893, numbered 11, 29, 30, 31, 32, 33 and 34, have been compromised and settled upon terms that Wm. Jordan and A. I. Parker and wife, Martha W. Parker, pay all the costs in all of said actions to be taxed by the clerk, including allowance to L. L. Smith as referee and W. P. Shaw as commissioner for selling the property mentioned in the six last named cases, and pay to John E. Vann as surviving administrator of J. J. Jordan (P. B. Picot having died since this action was commenced), in full settlement of all matters litigated and set out either in the complaints or answers

filed in such actions, and said compromise and settlement appearing to be fair and just settlement of the matters embraced therein, it is now by consent of all parties, ordered and adjudged that the aforesaid seven cases be and they are hereby consolidated.

"It is further considered and adjudged that John E. Vann as surviving administrator of J. J. Jordan, deceased, recover of the said Wm. Jordan and A. I. Parker the sum of $4,500.00, and the costs in the aforesaid seven cases to be taxed by the clerk, including allowances in No. 11, to L. D. Smith, as referee, of $50.00, and allowance to W. P. Shaw, as commissioner, in the other six cases as is provided by The Code.

"It is further considered that said recovery is in full settlement and satisfaction of all matters involved in the seven cases before mentioned, and on payment of the said sum of $4,500.00 and interest from 17 April, 1893, till paid and the costs of said actions as herein directed, all of the assets of the late firm of Jordan & Parker are to vest in and be the property of said Wm. Jordan and A. I. Parker, but nothing herein shall regulate in any way or affect the rights of said Wm. Jordan, A. I. Parker and Martha W. Parker as among themselves. R. B. Peebles, Atty. for John E. Vann, as surv. admr. of J. J. Jordan and other defendants. B. B. Winborne, Atty. for plaintiffs. W. D. Pruden, Atty. for plaintiffs. (Signed) John Gray Bynum, Judge Presiding."

Martha W. Parker died in 1914, intestate, and without issue, and the plaintiff is one of her nieces. Her husband, A. I. Parker, died in January, 1920, leaving a last will and testament, naming John E. Vann as his executor and authorizing him to make sale, either publicly or privately, of all his real estate not specifically devised. None of the property involved in this action was specifically devised under said will except Dickinson's Square, which was devised to the defendants, John R. Jordan and W. Mills Jordan. The defendants, John R. Jordan and W. Mills Jordan are the sons of William Jordan, who died intestate in 1913.

The cause came on for trial, and the judge directed the jury to answer the issues in favor of defendants. From judgment thereon, plaintiffs appealed.

At the close of all the evidence, the plaintiffs stated and admitted in open court that the plaintiff, Etta Jordan Crocker, claimed no interest in said lands as an heir at law of her father, Joseph J. Jordan, and was claiming only as an heir of Martha W. Parker.

Bridger & Ely and Travis & Travis for plaintiff.

Winston & Matthews, Stanley Winborne and W. B. Boone for defendants.

BROGDEN, J. The plaintiff claims a one-twelfth undivided interest in the land involved in this controversy as heir at law of her aunt, Martha W. Parker. The defendants claim the land under the will of A. I. Parker, the husband of Martha W. Parker. The first question, therefore, to be determined is whether or not Martha W. Parker, upon her death in 1914, owned an interest in said land. If she did, the plaintiff is entitled to recover. If she did not, the plaintiff has no interest in the land and the judgment of the court was correct.

The record discloses that the land in controversy, except the Old Town farm, was originally conveyed to Joseph Jordan, John Jordan, William Jordan and Martha Jordan, who afterwards married A. I. Parker. After the special proceedings for partition were instituted, the contract of 4 August, 1884, was duly entered into by the parties. On that date Martha W. Parker owned a one-fourth undivided interest in all the land except the Old Town farm. There was a dispute as to whether or not the deed for this property constituted an estate by entirety in A. I. Parker and Martha W. Parker.

The contract of 4 August provided that the property should be sold for $18,000.00. Therefore, each tenant in common, nothing else appearing, would be entitled to $4,500.00 of the purchase money. In the report of sale by the commissioner on 20 October, 1884, it was recited that the parties had entered into a private agreement wherein "they stipulated that A. I. Parker, Martha W. Parker and William Jordan should become the purchasers" of the land for the sum of $18,000.00; and further recited, "the purchasers are part of parties plaintiff and have not paid the purchase price of said property. They are to pay six per cent interest on the purchase price from 4 August, 1884, and to pay J. J. Jordan the amount that may be due him by 1 January, 1885, as will appear by reference to the agreement between the parties."

In the judgment at the Spring Term, 1893, all the cases were consolidated and it was adjudged that "John E. Vann, as surviving administrator of J. J. Jordan, deceased, recover of the said William Jordan and A. I. Parker the sum of $4,500.00, the costs in the aforesaid seven cases to be taxed by the clerk. . . . It is further considered that said recovery is in full settlement and satisfaction of all matters involved in the seven cases aforementioned, and on payment of said sum of $4,500.00 and interest from 17 April, 1893, until paid, and costs of said actions as herein directed, all the assets of the late firm of Jordan & Parker are to vest in and become the property of said William Jordan and A. I. Parker, but nothing herein shall regulate, or in any way affect the rights of said William Jordan, A. I. Parker and Martha W. Parker as among themselves.

The defendants contend that under this judgment the title to the entire property was to be vested in William Jordan and A. I. Parker, and that, as Martha W. Parker was a party to this proceeding, her interest in the land as tenant in common, was divested. It must be observed that no deed has ever been made for this land, and that the purchase money of $18,000.00 has never been paid. The only portion of the purchase money that has been paid was the $4,500.00 paid to Vann as administrator of J. J. Jordan.

Section 1904 of The Code of 1883, which was in force at the time of the agreement of 4 August, 1884, provides as follows: "Whenever it appears by satisfactory proof that an actual partition of the lands cannot be made without injury to some or all of the parties interested, the court shall order a sale of the property described in the petition, or any part thereof, on such terms as to size of lots, place or manner of sale, time of credit and security for payment of purchase money, as may be most advantageous to the parties concerned, and, on the coming in of the report of sale and confirmation thereof, and payment of the purchase money, the title shall be made to the purchaser or purchasers at such time and by such person as the court may direct, and in all cases where the persons in possession have been made parties to the proceeding, the Court may grant an order for possession."

Section 1921 of The Code of 1883 provides as follows: "Upon confirmation of the report, the Court shall secure to each tenant in common his ratable share in severalty of the proceeds of sale; and the deed of the officer or person appointed to sell, when such deed is directed to be made, shall convey to the purchaser such title and estate in the property as the tenants in common had."

These sections are brought forward in C. S., 3241. Therefore, in order to divest the title of a tenant in common, confirmation and payment of purchase money was necessary. *Taylor v. Carrow*, 156 N. C., 6.

In *Taylor v. Carrow*, 156 N. C., 6, it is held: "On the other hand, even when there has been a decree of confirmation, title will not be executed until the purchase money has been paid." *Burgin v. Burgin*, 82 N. C., 197; *White, ex parte*, 82 N. C., 378.

But it is contended by the defendants that when the sale was confirmed by the judgment of the clerk on 13 November, 1891, that William Jordan, A. I. Parker and Martha W. Parker became equitable owners and acquired an equity to demand a deed for the premises upon the payment of the purchase money. *Upchurch v. Upchurch*, 173 N. C., 91; *Farmer v. Daniel*, 82 N. C., 152; *Joyner v. Futrell*, 136 N. C., 301. Therefore, if a deed had been made to William Jordan and A. I. Parker and Martha W. Parker, that A. I. Parker and Martha W. Parker, being husband and wife, would take an estate by entirety, and, hence, upon

the death of Martha W. Parker in 1914, the entire property would vest in her husband, A. I. Parker. *Davis v. Bass,* 188 N. C., 200; *Hampton v. Wheeler,* 99 N. C., 222.

This contention, however, cannot be maintained for the reason that if the wife alone be entitled to a conveyance, and the conveyance is made to her and her husband jointly, the husband will not be entitled to retain the whole by survivorship. The principle is thus expressed in *Sprinkle v. Spainhour,* 149 N. C., 223: "Hence, if the wife alone be entitled to a conveyance, and it is made to her and her husband jointly, the latter will not be allowed to retain the whole by survivorship. And it matters not if the conveyance is so made at her request, because being a married woman she is presumed to have acted under the coercion of her husband. It is one of the essentials of the peculiar estate by entireties sometimes enjoyed by husband and wife, that the spouses be jointly entitled as well as jointly named in the deed." *Harrington v. Rawls,* 136 N. C., 65; *Carson v. Carson,* 122 N. C., 645; *Garris v. Tripp, ante,* 211.

There is, in addition, another principle of law which prevents the divesting of the title of Martha W. Parker. The contract of the parties of 4 August, 1884, is a contract between husband and wife, and the title of the wife could not be transferred to the husband without observing the formalities required by C. S., 2515. As the interest of Martha W. Parker in the land was a part of her separate estate, her title thereto could only be divested by contract executed in accordance with the statute. "In the absence of such a contract a trust would result in the wife's favor, even if the deed operated to create the estate which it purports to convey." *Speas v. Woodhouse,* 162 N. C., 66; *Deese v. Deese,* 176 N. C., 527.

The defendants take the further position that the contract of 1884 and the compromise judgment of 1893 by *Judge John Gray Bynum,* constitute color of title, and that they have been in possession of the property, collecting the rents and profits, since the death of Martha W. Parker in 1914. This suit was instituted 7 March, 1925, and hence the defendants claim that they have been in possession of the land under colorable title for more than seven years. Color of title, says *Hoke J.,* in *Smith v. Proctor,* 139 N. C., 314, "is a paper-writing (usually a deed) which professes and appears to pass the title but fails to do so." *Tate v. Southard,* 10 N. C., 119; *Burns v. Stewart,* 162 N. C., 360; *Seals v. Seals,* 165 N. C., 409.

We do not think that the contract of 1884, the confirmation of sale based thereon, and the compromise judgment of 1893 constitute color of title as against Martha W. Parker for the following reasons:

(1) The contract of 1884 stipulated a fixed value of $18,000.00 for the whole property. It neither contemplated nor required the pay-

ment of this total sum, but only required the payment of that portion of the purchase price accruing to J. J. Jordan. In other words, a fair interpretation of this agreement leads to the conclusion that the parties were simply contracting to purchase the interest of J. J. Jordan in the property.

(2) The report of the sale by the commissioner recites that "the property described in the complaints sold for the sum of $18,000.00 in the way in which the sale is heretofore explained. Purchasers are part of the parties plaintiff and have not paid the purchase price of said property. They are to pay six per cent interest from 4 August, 1884, and to pay J. J. Jordan the amount that may be due him by 1 January, 1885." This report confirms the conclusion that the parties were proceeding upon the theory that they were purchasing only the share of J. J. Jordan in the property.

(3) The compromise judgment of *Judge Bynum* merely consolidated all the cases and compromised controversies existing between the parties with reference to the partnership assets, personal property and other matters set out in the record. This compromise judgment adjudged "that John E. Vann, as surviving administrator of J. J. Jordan, deceased, recover of said William Jordan and A. I. Parker the sum of $4,500.00 and the costs in the aforesaid seven cases to be taxed by the clerk, . . . and on payment of said sum of $4,500.00 and interest from 17 April, 1893, until paid, and the costs of said actions as herein directed, all the assets of the late firm of Jordan & Parker are to vest in and be the property of said William Jordan and A. I. Parker." Certainly, the separate real estate of Martha W. Parker, who was not a member of the partnership of Jordan & Parker, could not be transferred in this manner as assets of the partnership. William Jordan and A. I. Parker were to pay $4,500.00. This was the exact amount of the value of the interest of J. J. Jordan in the property, as determined by the parties, in the contract of 1884. Therefore, this judgment merely confirms the fact that when all the proceedings are considered as a whole that the parties were merely purchasing the interest of J. J. Jordan, and in the compromise judgment this interest was to become the property of A. I. Parker and William Jordan. A. I. Parker and William Jordan, as the record discloses, paid Vann, administrator of J. J. Jordan, the sum of $4,500.00.

It is true, as contended by the defendants, that under certain conditions partition proceedings constitute color of title. In support of this contention the defendants cite *McCulloh v. Daniel*, 102 N. C., 529; *Canter v. Chilton*, 175 N. C., 406; *Lumber Co. v. Cedar Works*, 165 N. C., 83. In the *McCulloh case* the defendant claimed under a deed made in certain judicial proceedings to sell the land of testator

to make assets. In *Canter v. Chilton, supra,* there was a deed made by the commissioner under order of Court in a proceeding for decreeing a sale for partition.

In the case of *Lumber Co. v. Cedar Works, supra, Justice Walker* says: "It has been held that where less than the whole number of tenants join in a proceeding to sell the common estate for partition, and the same is sold, a deed made under order of the court to the purchaser is color of title, and seven years' adverse possession thereafter by him under the deed will bar the cotenants who were not parties."

There are other cases to the same effect. The theory upon which all these cases are based is that the proceedings to constitute color of title must actually undertake to pass title to the purchaser.

For the reasons given we do not think this principle is applicable to the facts of this case.

We conclude, therefore, upon the record that the interest of Martha W. Parker in said land was not vested in her husband, A. I. Parker, by said proceedings.

There is a controversy as to whether the deed for the Old Town farm was made to A. I. Parker's wife or to A. I. Parker and wife. If this deed was made to A. I. Parker and wife, the interest of Martha W. Parker in this property would vest in her husband by survivorship. This is a question of fact for a jury.

It also appears from the record that in 1922 a suit was brought in which all the heirs at law of the parties were joined, to ascertain the rights of the parties in said lands. In that suit the jury found that the plaintiffs, Etta Jordan Crocker and Bernard Crocker, owned no interest in said land, and there was judgment accordingly. But the record further shows that summons in that action was never served upon the plaintiff, Etta Jordan Crocker, or her husband, and therefore said judgment was a nullity as to her. *Condry v. Cheshire,* 88 N. C., 375; *Card v. Finch,* 142 N. C., 144; *Clark v. Homes,* 189 N. C., 703.

Reversed.

J. F. BATTS ET UX. v. TOWN OF CARY ET AL., AND TOWN OF CARY v. J. F. BATTS ET UX.

(Filed 27 October, 1926.)

Municipal Corporations—Cities and Towns — Condemnation — Issues—Damages—Nominal Damages—Appeal and Error—Correcting Verdict.

Where the jury have answered an issue as to the mere act of trespass against a town for the taking of plaintiff's land for a public use, in a

substantial sum, and have also answered a different issue finding the damages for the permanent taking of his land, the latter issue will stand on appeal reducing the former issue to a nominal sum.

APPEAL by town of Cary from *Barnhill, J.*, at March Term, 1926, of WAKE.

Civil action to recover damages for wrongful trespass, and proceeding to condemn land for a public purpose, consolidated, by consent, and tried on the following issues:

"1. Did the town of Cary enter upon the lands of J. F. Batts unlawfully and cut a trench thereon as alleged? A. Yes.

"2. If so, what damage, if any, is J. F. Batts entitled to recover therefor? A. $750.00.

"3. What damages, if any, is J. F. Batts entitled to recover as compensation for the condemnation and location of a sewer disposal plant and pipes upon his land? A. $3,250.00."

From a judgment on the verdict awarding J. F. Batts the sum of $4,000.00, and adjudging that upon the payment of said sum the town of Cary shall be entitled to a perpetual easement for a sewer line and disposal plant on the lands of Batts and wife, as described therein, the town of Cary appeals, assigning errors.

J. W. Bailey and Brantley Womble for plaintiffs, Batts and wife.
Templeton & Templeton for defendants, town of Cary.

STACY, C. J. In the Spring of 1925, the town of Cary undertook to install a system of municipal waterworks, including a sewage disposal plant, and, in doing so, entered upon the lands of J. F. Batts and wife and began the cutting of a trench preparatory to laying pipe, etc. On 6 May suit was started by Batts and wife to enjoin the town from proceeding further and for damages. It was alleged and denied that Batts and wife had consented for the agents of the town to enter upon their lands. On 28 May, the town of Cary instituted a condemnation proceeding in the Superior Court of Wake County in order that it might, by law, acquire the right to proceed with the work already started on the lands of Batts and wife.

By consent, the two actions were tried together, J. F. Batts and wife being treated as plaintiffs in the consolidated action, and the town of Cary as defendant.

We find no error in the trial of the cause, except it appears, from the evidence and the charge, that the amount awarded for wrongful trespass, as represented by the answer to the second issue, was duplicated by the jury in fixing the compensation, under the third issue,

to be paid for the rights condemned. *Ingram v. Hickory,* 191 N. C., 48; *Remington v. Kirby,* 120 N. C., 320.

With the elimination of all over a nominal amount that was assessed under the second issue, the verdict and judgment will be upheld.

Modified and affirmed.

E. D. TYLER AND ED SMITH v. MARY HOWELL, M. F. TABORN AND W. L. BARKER.

(Filed 27 October, 1926.)

1. Fraternal Orders—Supreme Lodge—Constitution and By-Laws—Evidence—Injunction.

Where a local or benevolent fraternal order exists under a charter granted by the supreme council, and for years the local order has become inactive on account of failing interest and membership, with its meetings discontinued, and the question of an injunction against the sale of its property by a few of its members claiming to be in financial standing is resisted by the plaintiffs, also claiming to be in good financial standing, the sole question being as to whether a written notice was required under the constitution and by-laws of the supreme lodge: *Held,* an authenticated copy of the constitution and by-laws of the supreme lodge, under the existing circumstances may be introduced in evidence, showing that a previous written notice was required, and make a prima facie case thereof.

2. Same—Injunction.

Where a local fraternal and benevolent lodge has existed under the constitution and by-laws of the supreme lodge requiring written notice to be given to its members before suspension as a financial member, etc., for nonpayment of dues, etc., and such notice has not been given accordingly: *Held,* a resolution passed at a meeting of the local lodge authorizing a sale and conveyance of its property by trustees, C. S., 6536, without complying with this requirement, is invalid, and at the suit of such wrongfully suspended members, an injunction will lie.

APPEAL by defendants from *Devin, J.,* and a jury, at February Term, 1926, of GRANVILLE. No error.

Necessary facts stated in the opinion.

T. Lanier and Hicks & Stem for plaintiffs.

A. W. Graham & Son for defendants.

CLARKSON, J. This action was brought by plaintiffs against defendants to restrain and enjoin the defendants from selling certain real estate on Penn Avenue, in the town of Oxford, N. C., belonging to

Queen Isabella Lodge, No. 54, of the Independent Order of Good Samaritans and Daughters of Samaria. The lodge was organized on 27 September, 1879, under a charter of the Right Worshipful Grand Lodge, No. 10, of North Carolina.

As indicated by the name, the lodge was named after the patroness of Columbus and the Samaritan who was a neighbor unto him who fell among thieves on the way from Jerusalem to Jerico.

The members of the lodge were of the colored race, and the purposes were to take care of the sick and provide for the burial of their members and for other worthy and charitable acts. In the beginning, the organization functioned and had a large membership and fulfilled the ideals of those after whom the lodge was named.

There was an insurance provision connected with the lodge, but this provision in the charter of the Right Worshipful Grand Lodge, No. 10, was revoked by the Insurance Commissioner of North Carolina about 1909. The local lodge then began to decline and cease to function as theretofore. A few of the members had the building rented out, kept in force the insurance on the building, paid the street assessments for paving, electric light bills, bills for repairs and paid the death benefits of certain members who it is contended were in good standing when they died. Practically all of this money came from the rental of the building. There is a surplus now on hand of about $138.00. There are no records of collection of dues from 1914 to 1925, according to the secretary, Julia D. Willis.

It is contended by defendants that in the year 1925, defendants Mary Howell and W. L. Barker (defendant M. F. Taborn refusing to join with them after suit was brought unless the whole lodge came in, according to her testimony) were members in good standing. The membership had dwindled to six; that the three defendants having been appointed trustees, a resolution of the members in good standing was passed to the effect that the property be sold and the lodge disband. That the proceeds of the sale be distributed to such parties as may be entitled, according to their respective rights. Upon the alleged trustees advertising this property for sale, plaintiffs brought this action to restrain and enjoin the defendants from selling the property.

The contest and trial in the court below was as to the standing of the respective parties in the lodge. The charter granted the lodge at Oxford by the Grand Lodge, on 27 September, 1879, divided the members into two classes—"financial" and "unfinancial." That certain monthly dues had to be paid by the members, and in the event of a member being suspended for nonpayment of monthly dues, the time allowed was three months to pay up or the membership would be forfeited and the name taken off the roll of the lodge; that the plaintiffs

were "unfinancial" and had forfeited their membership; that plaintiff Ed Smith had paid no dues since 1909, and Ed D. Tyler had paid nothing since 1913.

The plaintiffs, on the other hand, contend that they are "financial," and still members of the lodge; that the provisions in the 1879 charter were changed by constitution and by-laws of 1886, and a member of the lodge could not be suspended, expelled or dropped for the nonpayment of dues without written notice; that this superseded the constitution and by-laws of 1879; that the material provisions of the 1886 constitution and by-laws germane here are as follows: (1st) When the lodge suspends or expels a member, they shall send a written notice to the member informing him or her of the same. (2d) When a member is "unfinancial" the lodge shall notify him of the same and said member shall have one month to pay up square on the books, and if they fail to comply within that time the lodge shall have the right to suspend until their arrearages are paid in full. (3rd) No member shall be suspended from the order *for nonpayment of dues without first being notified in writing* of the indebtedness to the lodge and a majority of the members present voting for the same. The secretary shall send them written notice informing them of their suspension.

It is further contended by plaintiffs that they had no notice or written notice and that they were still "financial" members of the lodge; that the property was rented out and the lodge went down for lack of members and ceased to function temporarily. No meetings were legally held and no one authorized to whom dues could be paid if they were due, and that they were able, ready and willing to perform their duties as members.

This is the substance of the material contentions as we gather them from the record.

The issues submitted to the jury by the court below, and their answers thereto, were as follows:

"1. Were the plaintiffs, Ed D. Tyler and Ed Smith, or either of them, at the time of the institution of this action, members of Queen Isabella Lodge, No. 54, of the Independent Order of Good Samaritans and Daughters of Samaria? Answer: Yes.

2. Are the defendants without authority to sell the property described in the complaint? Answer: Yes."

The defendants earnestly contended that the court below erred in allowing plaintiffs to offer in evidence the booklet of 1886. If it is error, was it harmful, prejudicial or reversible?

It will be noticed that the main controversy was that under the charter of 1879 a member could become "unfinancial" without notice. Under the 1886 provision, written notice must be given. Around this

the contest was waged. Defendants say in their brief: "Plaintiffs' whole case depended upon the provision in the booklet produced by them to the effect that a written notice had to be sent to a member before he was dropped."

Ed D. Tyler, plaintiff: "Witness was handed a book and asked what book it was. He stated it was the constitution and by-laws of the Good Samaritans dated 1886. The plaintiff, after the same was identified, introduced in evidence the constitution and by-laws of The Right Worshipful Sovereign Grand Lodge, No. 10, and the Government of the Subordinate Lodges, Independent Order of Good Samaritans and Daughters of Samaria adopted at the fourth session of the State Grand Lodge, No. 10, at Charlotte, N. C., in the year 1886, and read therefrom and cited," among others, sections numbered for convenience 1, 2 and 3 before mentioned. This testimony was objected to and error assigned. We think it was competent.

The plaintiff Tyler, on direct examination, testified: "That he could not tell the date when the last regular meeting of the lodge was held, *but it was eight or nine years ago, and that he was present at the last meeting and was then in good standing, and has never received any notice of a meeting since.*" . . . "He was 'financial,' and never received notice of suspension or expulsion." On redirect examination he testified: "That he had received no notice that the lodge had been revived—did not know it had been revived; Barker had always said he could not get enough members to hold a meeting."

Ed Smith, plaintiff, testified in part: "Was a member of Queen Isabella Lodge, No. 54. Don't know when last meeting of the lodge was held; think I attended the last meeting in the lodge room. I was then 'financial' with the lodge. Have received no notice that I was 'unfinancial' with the lodge, nor any written notice that I had been suspended or expelled for nonpayment of dues." On cross-examination by defendants, Smith testified, without objection: "*Witness stated that there was a time limit in which a member must pay his dues, and it might have been thirty or sixty days, and then they were suspended, but were not suspended or expelled or dropped until they got a written notice;* that was the rule of the lodge."

Bacon, Benefit Societies and Life Insurance (3 ed.), latter part section 79, says: "It has been said that the constitution and by-laws purporting to be published by the Supreme Council of the order and furnished the local lodge and used by it are admissible in evidence without further proof of their adoption." *Home Circle Society v. Shelton,* 81 S. W., p. 84 (Texas).

We think the evidence made a prima facie case that the constitution and by-laws had been adopted. They were printed, purported to be

used and were used by the lodge. But, even if admitted erroneously, such error was harmless. The defendants, without objection and by their own cross-examination, brought out the fact that written notice was required to a member before they were suspended, expelled or dropped.

In *Cook v. Mebane,* 191 N. C., p. 7, it was held: "If it was error to exclude the specific questions asked, as contended by defendant, it can't complain. A general question was asked by defendant embodying substantially the specific questions and answered without objection." "The erroneous admission of evidence on direct examination is held not to be prejudicial when it appears that, on cross-examination, the witness was asked substantially the same question and gave substantially the same answer." *Hamilton v. Lumber Co.,* 160 N. C., 48; *Ledford v. Lumber Co.,* 183 N. C., 616; *Gentry v. Utilities Co.,* 185 N. C., 287; *Cook v. Mebane,* 191 N. C., 1; *Hanes v. Utilities Co., ibid.,* 13; *Willis v. New Bern, ibid.,* 514.

In *Carden v. Sons and Daughters of Liberty,* 179 N. C., at p. 401, it is said: "The by-laws required the notice of assessments to be sent members by the lodge officers. It must be shown that this requirement was complied with and the member did not lose her good standing unless this was done. If the failure to send such notice was the negligence of the local agent or financial secretary, such default did not fall upon the member, and while the amount which the jury found to be thus due ($2.50) still remained a debt to be discharged by the member, which the jury has allowed as a credit on the $300, it did not place her out of the position of being in good standing. *Doggett v. Golden Cross,* 126 N. C., 486; *Duffy v. Ins. Co.,* 142 N. C., 106; *Lyons v. Grand Lodge,* 172 N. C., 410."

C. S., 6536 is as follows: "Appointment of trustees to hold property. The lodges of Masons, Odd Fellows, Knights of Pythias, camps of Woodmen of the World, councils of the Junior Order of United American Mechanics, orders of the Elks, Young Men's Christian Associations, Young Women's Christian Associations, societies for the care of orphans and indigent children, societies for the rescue of fallen women, and any other benevolent or fraternal orders and societies, may appoint from time to time suitable persons trustees of their bodies and societies, in such manner as they deem proper, which trustees, and their successors, shall have power to receive, purchase, take, and hold property, real and personal, in trust for such society or body. The trustees shall have power, when instructed so to do by resolution adopted by the society or body which they represent, to mortgage or sell and convey in fee simple any real or personal property owned by the society or body; and the conveyances so made by the trustees shall be effective to pass the prop-

erty in fee simple to the purchaser or to the mortgagee or trustee for the purposes in such conveyance or mortgage expressed. If there shall be no trustee, then any real or personal property which could be held by such trustees shall vest in and be held by such charitable, benevolent, religious, or fraternal orders and societies, respectively, according to such intent. This shall not affect vested rights nor apply to suits pending on the ninth day of March, one thousand nine hundred and fifteen."

Under the above law it is provided how benevolent or fraternal orders and societies can acquire and dispose of property.

We think the issues are proper ones from the pleading and evidence. Although the record is voluminous and there are numerous assignments of error, we think, on the whole record, there is no prejudicial or reversible error. It was mainly a question of fact to be determined by the jury.

On the verdict the court rendered the following judgment: "It is therefore ordered, adjudged and decreed by the court, that the plaintiffs, Ed D. Tyler and Ed Smith, at the time of the institution of this action were members of Queen Isabella Lodge, No. 54, of the Independent Order of Good Samaritans and the Daughters of Samaria. It is further adjudged by the court that the defendants are without authority to sell the property described in the complaint. It is further ordered, adjudged and decreed by the court that the defendants be, and they are hereby restrained and enjoined from selling the property mentioned and described in the complaint in this action, under the authority alleged in answer; and they are further restrained and enjoined from in any way interfering with the said Ed D. Tyler and Ed Smith in the exercise of their full rights, as members of said lodge. It is further ordered that the defendants pay the cost of this action."

It was stated on the argument that this action had revived interest in the lodge. The hope—Phoenix like—will rise in youthful freshness from its own ashes and bring to life again this lodge—once so useful to the human among the colored race, and emulate the goodness of its namesake—a queen who made possible the discovery of this fair land—and also continue the ideals of the other namesake—the Samaritan—that our neighbor is the one who is down and needing help along life's broad highway. The jury's verdict and the judgment of the court below have saved this humble lodge from sale and division of the proceeds, perhaps never intended by the original Christian promoters of the colored race.

From a careful inspection of the record, briefs of counsel, and judge's charge, we can find

No error.

J. R. SNEEDEN ET AL. v. NURNBERGER'S MARKET.

(Filed 3 November, 1926.)

1. **Chattel Mortgages—Definition—Choses in Action.**

A chattel mortgage is a conditional transfer of the property pledged, vesting the title in the mortgagee absolutely in law upon condition broken, and as against purchasers and creditors must be registered. C. S., 3311.

2. **Debtor and Creditor—Pledges of Personal Property—Possession.**

A mere pledge of personalty for the payment of a debt, as distinguished from a chattel mortgage, passes the actual or constructive possession in the pledgee, or at most, a special property in the pledge with a right of retainer by the pledgee until the debt is paid.

3. **Same—Principal and Agent.**

Where the pledgee of personal property delivers the possession to the pledgor for the purpose of selling it and applying the proceeds to the payment of the debt, the pledgee is in constructive possession of the thing pledged under the principal of agency.

4. **Same.**

Where the pledgee has assigned to him certain book accounts and other choses in action to be collected by the pledgor and paid to him in the event of the latter's failure to pay for supplies weekly furnished by the former in certain amounts as to value, and permits the pledgor to mingle the moneys thus collected with his general funds until condition broken, whether the written instrument containing this contract of sale be recorded as an unregistered chattel mortgage or mere pledge: *Held*, it is invalid as a preference against the general creditors of the pledgee.

APPEAL by Swift & Company, intervening petitioner, from *Midyette, J.*, at April Term, 1926, of NEW HANOVER.

The plaintiffs brought suit on behalf of themselves and all other creditors of the defendant for the collection of $253.34, and the appointment of a receiver of the defendant's business. Trial by jury was waived and the trial judge found the facts.

On 7 October, 1924, the defendant in writing assigned to Swift & Company all its book debts, accounts, and choses in action then due or to become due from designated customers of the defendant, together with a trust receipt, and received from Swift & Company a letter interpreting the receipt. The defendant's total indebtedness is approximately $10,000; the amount due Swift & Company is $2,594.85; and the total amount for distribution is about $1,300.

The receiver contended on the hearing that the assignment to Swift & Company constituted a preference under C. S., 1611, or if not, then a mortgage, and was invalid because not registered as required by section 3311.

It was adjudged that the intervening petitioner, Swift & Company, had a valid unsecured claim against the defendant for $2,594.85, but no lien or preference upon the assigned accounts, and that the proceeds from the collection of the accounts are general assets in the hands of the receiver.

Swift & Company excepted and appealed.

Rountree & Carr for appellant.
Bellamy & Bellamy for receiver.

ADAMS, J. On 7 October, 1924, the defendant executed a written instrument by which it assigned and transferred to Swift & Company all the accounts and choses in action then due it by its customers or at any time thereafter to become due, and authorized the assignee to collect the respective sums as they matured, the assignment being "continuing security" for the defendant's present and prospective indebtedness to the assignee. The defendant then executed a "trust receipt" acknowledging possession of the assigned papers for the purpose of collection and remittance to Swift & Company, who at the same time wrote and delivered to the defendant a letter purporting to interpret the receipt just given. These three papers bear the same date and constitute one transaction. Neither of them was registered; and it was held by the trial court that the unregistered assignment was not enforceable against the defendant's general creditors. C. S., 3311.

This conclusion was no doubt based on the theory that the papers in question constitute a chattel mortgage of choses in action, as contended by the creditors; but the appellant argues that the papers constitute a pledge to secure a preëxisting debt.

In construing particular statutes, some of the courts have held that a chose in action is not the subject of a chattel mortgage, but in the absence of statutory restrictions, the general rule seems to be otherwise. 11 C. J., 433, sec. 43. While it is not necessary now to decide the question, we refer to *Wallston v. Braswell,* 54 N. C., 137, in which it was observed that no provision had been made in reference to the counties in which a deed of trust on choses in action should be registered, and to the clause relating to the subject in the amended statute. C. S., 3311.

While a debt may be secured by a mortgage or by a pledge of personal property, between a mortgage and a pledge there is a recognized and approved distinction. The former is a conditional transfer or conveyance of the property itself; and if the condition is not performed, the title vests absolutely *at law* in the mortgagee; the latter passes the possession of the property, or at most a special property in the pledge, with a right of retainer until the debt is paid. *Doak v. Bank,* 28 N. C., 309; *Ball-Thrash v. McCormick,* 162 N. C., 471.

To make a valid pledge, the pledgee's actual or constructive possession of the article is essential and as a rule restoration of possession to the pledgor is inconsistent with the pledge. The principle is treated in *Barrett v. Cole,* 49 N. C., 40. There one Due, being indebted to the plaintiff, delivered to him a horse as security for a debt and immediately the possession was restored to Due. The horse was sold by an officer under process against Due at the instance of the defendant Tyson, who was the plaintiff in the execution. The Court said: "The contract between Due and the plaintiff, by which the horse in question was delivered to the latter, for the purpose of securing a debt which Due owed him, was undoubtedly intended by the parties as a security for money, and must have been either a mortgage or a pledge. If it were a mortgage, it was clearly void as against creditors, because not in writing, and proved and registered within six months as required by law. Rev. Stat., ch. 37, sec. 23; (Rev. Code, ch. 37, sec. 22). If it were a pawn or pledge, we think that it was equally void as against the creditors, because the possession, instead of being retained by the pawnee, was immediately restored to the pawnor."

To the same effect are *Smith v. Sasser,* 49 N. C., 43, and *Owens v. Kinsey,* 52 N. C., 245. In *Bodenhammer v. Newsom,* 50 N. C., 107, it is said: "The only difference between the facts of that case *(Smith v. Sasser)* and the present is the length of time during which the pawnor had the article in possession, after a redelivery by the pawnee, before he sold it. But that cannot make any difference in the rule of law applicable to the transaction. By giving up the possession of the article pawned, the pawnee lost his lien, and it would be a fraud upon an innocent purchaser from the pawnor if the pawnee were permitted to recover the pawn from him."

But to this general rule there are exceptions; one is, that the pledgee may redeliver the property to the pledgor for the purpose of having it sold for the benefit of the pledgee. So it was held in *Rose v. Coble,* 61 N. C., 517: "It is true that to the validity of a pledge it is necessary that there should be a delivery to the pledgee, and that his possession should continue, and that the pledge is lost by giving the pledgor the control of it. But the fact that the pledgee authorized the pledgor, as his agent, to take the mare to Greensboro to try to sell her to raise money to pay the debt for which she was pledged, does not contravene that rule, because the possession of the agent was the possession of the principal."

If it be conceded for the purpose of argument that the three papers taken together make a pledge, does it appear therein that the appellant appointed the defendant its agent within the scope of the principle just stated?

In the appellant's letter purporting to interpret the "trust receipt" was an instruction that the defendant need not keep the trust funds

arising from collections on the assigned accounts separate from its own funds so long as the defendant paid Swift & Company $150 each week. Conditioned upon making this payment, the defendant was to have credit with the company in the sum of $250 a week, and was to keep the "trust fund" separate from its own only in the event it should make default in its payments.

It is useless to deny that the trust receipt and the letter of interpretation are much more than the creation of a bare agency for the collection of the accounts. Such a course of business is utterly inconsistent with the idea that the defendant retained the accounts only for the purpose of collecting them as the pledgee's agent. The market was to continue its business under a secret trust agreement with the appellant. What means of information had the defendant's creditors as to the actual relation existing between the contracting parties? Would they have extended credit with knowledge of this relation? The object of the rule in reference to the pledgee's retaining possession is to prevent the pledgor from inducing the belief that he is the owner of the pledge. This object was defeated by a device, whatever the intention of the parties may have been. The pledgee consented to the intermixture of pledged with unpledged funds and did not retain the sole possession of the assigned accounts, or in any event did not retain such possession as is required to reserve the pledgee's lien.

So, whether the contract be construed as a mortgage or a pledge, the result is the same. If a mortgage, it was voidable as to the defendant's creditors because it was not registered; it was not enforceable as a pledge because the lien was not maintained. *Quacunque via,* the judgment must be affirmed. *Moors v. Reading,* 167 Mass., 322, 57 A. S. R., 460; *Casey v. Cavarock,* 96 U. S., 467, 24 L. Ed., 779.

Affirmed.

RALEIGH IRON WORKS COMPANY v. LEE COUNTY COTTON OIL COMPANY.

(Filed 3 November, 1926.)

1. Contracts—Damages—Notice of Loss—Contemplation of Parties.

Where a machine shop has represented that it is fully equipped and prepared to repair certain boxes used in the manufacture of cotton-seed oil, and knew the purpose for which these boxes were wanted, and makes the repairs so that they were so faulty and defective as to make it impossible to use them without loss of time and greatly increased expense of manufacture: *Held*, the damages caused by such increase of cost are reasonably considered as having been within the contemplation of the parties, and are recoverable by the party sustaining them.

2. Same—Speculative Damages.

Where damages are recoverable for the faulty repair of machinery or implements used in the manufacture of certain products, the loss of time and increased cost of labor in their use as replaced, is an element of damages.

CIVIL ACTION, before *Barnhill, J.*, at March Term, 1926, of WAKE.

The plaintiff, W. T. Harding, is engaged in the business of manufacturing founders, and machinists, under the name and style of Raleigh Iron Works Company. The defendant is engaged in the business of manufacturing oil from cotton seed, and also in the manufacture of cotton-seed meal.

Oil is manufactured from cotton-seed meal by machinery, and an essential part of such machinery is the oil press, columns, follow blocks and the press boxes, in which the oil is pressed from the seed.

The evidence tended to show that on or about 11 June, 1923, the defendant wrote the plaintiff, desiring to know if plaintiff could do certain repair work on steel columns and press boxes. The plaintiff replied to this letter on 12 June, stating, in substance, that he could do the work, and, among other things, was the following statement: "But feel quite sure we could handle that also, as we have the best equipped shop in the State for general repairs. Send your work to us, and we will do it well and at a fair price consistent with same." Thereafter, the parts of machinery referred to were delivered to the plaintiff for making the necessary repairs.

Witness Barringer, secretary and manager of defendant, testified: "I talked with Mr. Harding before I sent the work. He told me he had equipment to do the work, and that he did work for the Raleigh Oil Mill. . . . I made two trips to see Mr. Harding to get him to hurry up the work. I told him that the season was approaching, and that unless I got it I would be handicapped in getting the mill started, and he promised to get them back in a few days." There was no further evidence tending to show that the season for the operation of an oil mill begins about 11 September, and that the defendant received the first car of seed about 8 September.

The plaintiff brought suit against the defendant for the sum of $761.36 for services in making repairs to said machinery. The defendant filed answer, denying that it was indebted to the plaintiff in any sum, and setting up a counterclaim for damages for $6,800. The basis of defendant's counterclaim was—that when the plaintiff delivered the repaired machinery to defendant and it was installed in the factory, it was discovered that the repairs were faulty and defective to such an extent as to make it impossible to use the press boxes for the purpose for which they were intended; that the repairs were not done in a

workman-like manner, in that the sides of the press boxes were bent, and negligently and improperly assembled and riveted, and that, as a result thereof, it was with great difficulty and loss of time and increased labor and expense that the operations of defendant's mill could be carried on.

The following issues were submitted to the jury: (1) Is the defendant indebted to the plaintiff as alleged in the complaint? (2) If so, in what amount? (3) Did the plaintiff contract with the defendant to repair the mill presses in the manner alleged in defendant's counterclaim? (4) If so, did plaintiff breach said contract? (5) And, if so, what damages is defendant entitled to recover by reason thereof? The jury for its verdict answered the first issue, no; the second issue, none; the third issue, yes; the fourth issue, yes; and the fifth issue, $1,000.

From judgment for the defendant upon its counterclaim for $1,000 plaintiff appealed.

J. C. Little, Manning & Manning for plaintiff.
W. B. Jones, Seawell & McPherson for defendant.

BROGDEN, J. The material exceptions in the record present the question of the proper measure of damages. The defendant offered evidence tending to show that the side walls of the presses were negligently warped in the process of repairing them, and that this defect greatly increased the cost of operating the plant. The testimony was, "We have a cake knife to remove the cake from the boxes. We give a little twist and that loosens it up, and we push it out. After the machinery was sent back it would take two knives and probably a man or two before we could get the cake out of the boxes, and when we did get it out it was torn to pieces. It took ten or eleven days to make a tank of oil instead of five and a half, which it would take normally."

The items of damage claimed by the defendant consisted of extra labor in operating the machines after the repair, decreased output, and also increased cost per ton of oil by reason of poor extradition of the cakes referred to.

The plaintiff contends that the damages claimed by the defendant were not such damages as were within the reasonable contemplation of the parties.

So that, the merits of the controversy present two propositions:

1. Does the evidence warrant the award of special damages?

2. What are the proper elements of such damages?

Adams, J., in *Builders v. Gadd*, 183 N. C., 447, referring to the case of *Hadley v. Baxendale* (9 Eng. Exch., 341), says: "This case approves two rules: (1) If the particular contract cannot be distinguished from

the great mass of similar contracts only such damages may be recovered as would naturally and generally result from the breach; (2) but if there are special circumstances communicated to or known by the other party at the time the contract is made, special as well as general damages may be recovered." And, further, "And it is not necessary always that those facts should be mentioned in the negotiations, or in express terms made a part of the contract, but when they are known to the carrier under such circumstances, or they are of such a character that the parties may be fairly supposed to have them in contemplation in making the contract, such special facts became relevant in determining the question of damages."

Now, when are special damages reasonably supposed to have been in contemplation of both parties? (1) When there is express notice that special damages will reasonably result from the breach of the contract. *Lumber Co. v. Iron Works,* 130 N. C., 584; *Rawls v. R. R.,* 173 N. C., 6; *Builders v. Gadd,* 183 N. C., 447. (2) Notice may be implied from the inherent nature and character of the article, together with the attendant circumstances. *Lumber Co. v. R. R.,* 151 N. C., 23; *Pendergraph v. Express Co.,* 178 N. C., 344. (3) When the facts and attendant circumstances are of such character that the parties may be fairly supposed to have known that the property was designed for a special purpose or for a special use. *Peanut Co. v. R. R.,* 155 N. C., 149; *Builders v. Gadd, supra.*

In the case now under consideration there was evidence of express notice to the plaintiff of the particular use and function of the machinery in question. The general superintendent for the plaintiff testified: "I know that there was a quarter of an inch difference in the width at one end from the width at the other end. They are made slightly larger at one end so that the cake can be pushed out. If they were spread out in the center the cakes could not be pushed out, without difficulty."

C. P. Finnell, machinist for the plaintiff, who performed a part of the labor upon the machinery, testified: "I have seen machinery like this in operation. If the angles are not put back straight it is hard to get the cakes out after they are pressed."

The secretary and treasurer of the defendant testified: "I made two trips to see Mr. Harding to get him to hurry up the work. I told him that the season was approaching, and that unless I got it I would be handicapped in getting the mill started, and he promised to get them back in a few days."

There was, therefore, in this case ample notice of the special purpose for which this machinery was to be used and of relevant facts and circumstances which would warrant special damages upon breach of the contract.

This is not an action to recover loss of profits, but to recover for additional labor and increased cost of operation. These elements of damage, in cases where special damages are allowable, have been fully approved by the Court. Damages accruing for loss of time, board bills and railroad fare were approved in *Pendergraph v. Express Co.*, 178 N. C., 344. The reduced output of a mill and the expense of extra labor have also been approved as items of damage. *Rawls v. R. R.*, 173 N. C., 6. Indeed, in the *Rawls case, supra,* the Court ordered a new trial by reason of the fact that the trial judge instructed the jury to disallow such damages. The trial judge charged the jury in clear and express language that it was the duty of the injured party to do all that could reasonably be done to reduce or minimize the damage after the defects had been discovered.

In *Pendergraph v. Express Co., supra, Clark, C. J.,* says: "It is true that it was incumbent upon the plaintiffs to lessen the loss accruing from the negligence of defendant, and this the jury seems to have considered, and the court so charged."

Upon the whole record, we conclude that the case has been tried according to clearly established rules of law, and the judgment is upheld.

No error.

JOHN W. MOORE v. J. H. EDWARDS.

(Filed 3 November, 1926.)

1. **Judgments—Estoppel—Claim and Delivery—Damages for Wrongful Detention—Actions.**

   Where judgment is rendered against the defendant and the surety on his bond in claim and delivery, and therein no issue is submitted to the jury on the question of damages for the wrongful detention of the property, it does not estop the plaintiff from bringing an independent action to recover such damages. C. S., 610.

2. **Actions—Claim and Delivery—Principal and Surety—Parties.**

   To an independent action by plaintiff in claim and delivery to recover upon the defendant's surety bond damages for the deterioration, etc., of the property wrongfully detained, the surety may be sued alone without joining the principal defendant in the former action. C. S., 458.

APPEAL by defendant from *Lyon, J.,* and a jury, at January Special Term, 1926, of JOHNSTON. No error.

An action was formerly instituted in Johnston County Superior Court by J. W. Moore, present plaintiff, against R. W. Mitchell, for the recovery of a *Velie automobile.* The provisional, or ancillary,

remedy of claim and delivery was resorted to and in that case the present defendant, J. H. Edwards, signed the replevin bond of R. W. Mitchell, in the sum of $4,200, double the value of the property alleged in the proceedings in accordance with the statute.

The prayer of plaintiff in that action: "(1) That he recover judgment of the defendant, R. W. Mitchell, and his bondsman, J. H. Edwards, in the sum of $2,100.00; (2) for such other and further relief as the plaintiff may be entitled to in the premises."

The issues submitted to the jury and their answers thereto, were as follows:

"1. Is the plaintiff owner of, and entitled to the possession of the automobile described in the complaint? Answer: Yes.

2. What was the value of the automobile described in the complaint at the time of its seizure by the sheriff under a writ of claim and delivery in this cause? Answer: $2,000.00."

The judgment on the verdict was as follows: "It is ordered, considered and adjudged, that the plaintiff, John W. Moore, be and he is hereby adjudged to be the owner and entitled to the immediate possession of the Velie automobile, Model No. ....., described in the pleadings in this cause. It is further adjudged that if the possession of said automobile cannot be had, then in that event the plaintiff is hereby given judgment against R. W. Mitchell and his bondsman, J. H. Edwards, in the sum of $2,000.00, together with interest on the same from 3 September, 1920. It is further ordered, considered and adjudged that the defendant, R. W. Mitchell be and he is hereby ordered to deliver the Velie automobile above set out to the plaintiff, John W. Moore, in Smithfield, within five days from the date of this judgment; and that the cost of this action be and (the same) is hereby taxed against the defendant, R. W. Mitchell, and his bondsman."

A few days after this judgment was rendered, the defendant, R. W. Mitchell, delivered the Velie automobile to plaintiff. The present action was brought under the replevy bond against the surety J. H. Edwards for its "deterioration and dentention."

The defendant plead (1) That the former judgment was an estoppel or *res judicata;* (2) that the original defendant, R. W. Mitchell, was a proper and necessary party to the present action.

Wellons & Wellons for plaintiff.
Abell & Shepard and Winfield H. Lyon for defendant.

CLARKSON, J. The only questions here presented are: (1) The plea of estoppel or *res judicata;* (2) was the principal in the bond a proper and necessary party to this action?

The defendant, J. H. Edwards, signed the bond of R. W. Mitchell under C. S., 836, which is as follows: "At any time before the delivery of the property to the plaintiff, the defendant may, if he does not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, payable to the plaintiff, executed by one or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, with damages for its deterioration and detention, and the costs, if delivery can be had, and if delivery cannot be had, for the payment to him of such sum as may be recovered against the defendant for the value of the property at the time of the wrongful taking or detention, with interest thereon, as damages for such taking and detention, together with the costs of the action. If a return of the property is not so required, within three days after the taking and service of notice to the defendant, it must be delivered to the plaintiff, unless it is claimed by an interpleader. The defendant's undertaking shall include liability for costs, as provided in this section, only where the undertaking is given in actions instituted in the Superior Court."

C. S., 610, is as follows: "In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or for the recovery of possession, or for the value thereof in case a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for a return of the property, or for the value thereof in case a return cannot be had, and damages for taking and withholding the same."

In *Bowen v. King,* 146 N. C., p. 385, it is said: "As heretofore stated, it does not definitely appear how plaintiff reacquired possession of the property; but, assuming—and there are statements from some of the witnesses tending to show this—that the possession was restored by means of a former action of claim and delivery, while plaintiff could have had his damages assessed in the former action (Revisal, sec. 570; C. S., 610), the authorities seem to be to the effect that he was not required to take this course, but, after obtaining possession, could, in another action, recover damages for the injury done by the wrongful seizure and detention of his property. *Woody v. Jordan,* 69 N. C., 189; *Asher v. Reizenstein,* 105 N. C., 213."

We can find no statutory provision prohibiting separate actions in a case of this kind. It is, no doubt, better practice to try out the entire controversy in one action.

In *Trust Co. v. Hayes,* 191 N. C., p. 543, it is held: "It is undoubtedly the law that in claim and delivery proceedings, when the plaintiff

recovers, he is entitled to summary judgment against the sureties on the defendant's forthcoming bond, but it must be such as the law sanctions *(Hall v. Tillman,* 103 N. C., 276), and the form of the judgment should be 'for the possession of the property, for the recovery of the possession, or for the value thereof in case a delivery cannot be had, and damages for the detention' (C. S., 610) plus costs, with the further provision that the plaintiff recover of the sureties on the defendant's replevy bond the full amount of such bond, to be discharged, first, upon the return of the property and the payment of the damages and costs recovered by the plaintiff; or, second, if a return of the property cannot be had, upon the payment to the plaintiff of such sum as may be recovered against the defendant for the value of the property at the time of its wrongful taking and detention, with interest thereon as damages for such taking and detention, together with the costs of the action, the total recovery against the sureties in no event to exceed the penalty of the bond. *Hendley v. McIntyre,* 132 N. C., 276. . . . The judgment therefore should have followed the statute and the terms of the bond. *Council v. Averett,* 90 N. C., 168."

It will readily be seen by the issues and judgment in the former action of *Moore v. Mitchell,* that plenary issues were not submitted. The condition in the bond was "with damages for its deterioration and detention and the costs if delivery can be had." No issue was submitted "If delivery can be had, what were plaintiff's damages for deterioration and detention?" Under the issues and judgment, we cannot hold that in the present action the plea of estoppel or *res judicata* can avail defendant.

In *Hardison v. Everett, ante,* p. 374, *Brogden, J.,* says: "Estoppel by judgment arises from the following essentials: (1) Identity of parties; (2) identity of subject-matter; (3) identity of issues. *Wagon Co. v. Byrd,* 119 N. C., 460; *Tyler v. Capehart,* 125 N. C., 64; *Gilliam v. Edmonson,* 154 N. C., 127; *Coletrain v. Laughlin,* 157 N. C., 287; *Clarke v. Aldridge,* 162 N. C., 326; *Whitaker v. Garren,* 167 N. C., 658; *Price v. Edwards,* 178 N. C., 493."

As to defendant's contention that the principal in the bond is a proper and necessary party to this action, we cannot so hold. The statute is to the contrary. C. S., 458 is as follows: "Persons severally liable upon the same obligation, including the parties to bills of exchange and promissory notes, may all or any of them be included in the same action at the option of the plaintiff."

For the reasons given in the judgment of the court below, there is

No error.

LONNIE McNEAL v. LIFE AND CASUALTY INSURANCE COMPANY OF TENNESSEE.

(Filed 3 November, 1926.)

1. **Insurance, Life—Policy — Assignee of Policy — Insurable Interest—Pleadings.**

Where a policy of life insurance is taken out payable to the estate of the insured, and has been issued to the insured, he may make a valid assignment thereof to another in good faith and in the absence of a fraudulent purpose, and the one to whom it has been assigned may, upon its maturity, maintain his action against the insurer without alleging or proving that he had an insurable interest in the policy.

2. **Same—Fraud—Good Faith — Pleadings — Demurrer — Questions for Jury.**

As to whether the insured has assigned a policy of life insurance payable to his estate to another in good faith, or as a cloak to conceal a wagering contract, is a question for the jury when the issue is presented upon demurrer.

3. **Insurance, Life—Statutes—Medical Examination—Void Contracts.**

C. S., 6460, requiring a medical examination before the issuance of a life insurance policy, is a regulation imposed upon the insurer, and a failure to comply with this provision does not render the policy void as to the insured's rights thereunder.

4. **Statutes—Declaratory Statute—Insurance, Life—Medical Examination.**

The amendment by chapter 82, Public Laws of 1925, to C. S., 6460, was declaratory of the existing law with regard to the medical examination of the applicant for a policy of life insurance.

Civil action, tried before *Barnhill, J.*, upon appeal from the city court of Raleigh, at the April Term, 1926, of Wake.

Plaintiff alleged that on 4 February, 1924, the defendant issued a policy of life insurance in the sum of $300.00 to Isaac Hodge, said policy being No. U-4096891, and being payable to the estate of said Hodge; that thereafter the said Hodge duly assigned said policy to the plaintiff, Lonnie McNeal. It was further alleged that Hodge died on 5 May, 1924, and that said policy of insurance was paid up and in good standing at the time of his death.

The defendant filed answer, admitting that the policy was issued on the life of Isaac Hodge; and, while not denying the assignment, alleges that the policy was secured by fraud and fraudulent misrepresentation, in that the said Hodge was suffering with tuberculosis at the time the application for said policy was made.

Whereupon, the plaintiff filed a reply, denying that the insured Hodge ever filed an application for insurance and alleging that an agent of the defendant wrote the policy upon the life of Hodge and

accepted premium thereon, and that said policy was issued to Hodge without medical examination, and, therefore, contrary to law. In the meantime Lonnie McNeal died and his administrator, S. R. Murray, was duly made a party.

When the case was called for trial the following judgment was rendered: "This cause coming on to be heard and the defendant having moved for judgment on the pleadings, said pleadings consisting of a complaint, the answer and the reply of the plaintiff, and it appearing to the court that the plaintiff did not allege that he had an insurable interest in the life of the deceased, Isaac Hodge, and furthermore, that it was alleged in the reply that the policy contract was executed without a written application having been made by the insured, the deceased, Isaac Hodge, in violation of the statute relating thereto; and in the making of said motion for judgment on the pleadings, the defendant tendered judgment for the sum of $4.50, being the amount of the premiums that had been paid on the said policy and for costs to date;

It is thereupon considered, ordered and adjudged, that the plaintiff recover of the defendant the sum of $4.50 and the costs of this action, and that as to the other matters alleged in the complaint the action is hereby dismissed."

From said judgment plaintiff appealed.

H. L. Swain for plaintiff.
Willis Smith for defendant.

Brogden, J. When a policy of insurance, properly executed, is offered by the insurer and accepted by the insured as the evidence of their contract, it must be conclusively presumed to contain all the terms of the agreement for insurance by which the parties intend to be bound. And when a formal written policy is delivered and accepted, the written policy, while it remains unaltered, constitutes the contract between the parties. *Clements v. Ins. Co.*, 155 N. C., 57; *Wilson v. Ins. Co.*, 155 N. C., 173; *Hollingsworth v. Supreme Council*, 175 N. C., 615; *Guarantee Corporation v. Electric Co.*, 179 N. C., 402.

While it is admitted in the pleadings that the policy sued on was executed and delivered to Isaac Hodge, the defendant contends that the judgment of the court should be sustained by reason of the fact that the plaintiff had no insurable interest in the life of the deceased, Isaac Hodge, and, further, that it appeared that the policy had been issued without a medical examination as required by C. S., 6460. Two questions, therefore, are presented by this contention:

1st. Was it necessary for the plaintiff to allege and prove an insurable interest in the life of Isaac Hodge?

2nd. Was the policy void by reason of failure to comply with C. S., 6460?

The first contention as to insurable interest cannot be sustained for the reason that the policy was not originally issued to the plaintiff but issued to Isaac Hodge and payable to his estate. The policy was assigned, sometime after its issue, to the plaintiff. If the assignment was valid, then no insurable interest was necessary. This principle of law was thus stated by *Justice Hoke* in *Hardy v. Insurance Co.*, 152 N. C., 286: "We consider it, however, as established by the great weight of authority that where an insurant makes a contract with a company, taking out a policy on his own life for the benefit of himself or his estate generally, or for the benefit of another, the policy being in good faith and valid at its inception, the same may, with the assent of the company, be assigned to one not having an insurable interest in the life of the insured; provided, this assignment is in good faith, and not a mere cloak or cover for a wagering transaction." *Johnson v. Ins. Co.*, 157 N. C., 107; *Howell v. Ins. Co.*, 189 N. C., 212.

As to whether or not the assignment was made in good faith or as a mere cloak or cover for a wagering contract is a question of fact for the jury.

In regard to the second question as to the effect of C. S., 6460, the law is thus declared by *Justice Hoke* in *Morgan v. Fraternal Asso.*, 170 N. C., 75: "But the authorities are to the effect that, when a statute or valid regulation in restraint only of the company's action is made for the protection of the policyholder, a recovery may ordinarily be had, though the contract is in breach of the regulation."

In *Blount v. Fraternal Asso.*, 163 N. C., 167, *Justice Allen* says, referring to C. S., 6312: "The statute does not purport to deal with the validity of the contract of insurance, but with the insurance company." C. S., 6460 does not purport to invalidate the policy, but is a regulation of law imposed upon the insurance company. If it had been the intention of the Legislature, in enacting C. S., 6460, to invalidate the contract and to deny recovery thereon, it would have so enacted. *Ober v. Katzenstein*, 160 N. C., 440; *Tobacco Co. v. Tobacco Co.*, 144 N. C., 352; *Robinson v. Life Co.*, 163 N. C., 415.

C. S., 6460, was amended by chapter 82 of the Public Laws of 1925. This amendment provides, in substance, that where there has been no medical examination, the policy shall not be rendered void nor payment resisted on account of any misrepresentation as to physical condition of the applicant, except in cases of fraud. This statute, of course, was enacted subsequent to the institution of the present suit,

but it is in effect a legislative declaration of the law heretofore announced by the Court in the *Blount case, supra,* and in the *Robinson case, supra.*

We conclude, therefore, that there was error in the judgment and that the case should be tried upon its merits.

Reversed.

MRS. CATHARINE A. BARTON v. DANIEL BARTON ET AL.

(Filed 3 November, 1926.)

Evidence — Deceased Persons — Transactions and Communications — Statutes.

Where, in a suit seeking the equitable relief of reformation of a wife's deed of lands to her husband, evidence that the wife in the presence of her husband delivered the conveyance claimed by her to have been executed by the mistake of the justice of the peace, to said justice, who then took her acknowledgment, is not of a personal communication or transaction, etc., with her deceased husband as inhibited by C. S., 1795. *Smith v. Moore,* 142 N. C., p. 277, as to the question of principal and agency, cited and distinguished.

APPEAL by plaintiff from *Webb, J.,* at May Term, 1926, of FORSYTH.

Civil action to correct error in deed, alleged to have been caused by mutual mistake, or mistake of the draftsman, tried in the Forsyth County Court on the following issues:

"1. Was the deed executed by mutual mistake of Catharine A. Barton and A. A. Barton, conveying a fee simple except her dower interest instead of a life estate, as alleged in the complaint? A. Yes.

"2. If so, is the plaintiff estopped by her actions and conduct to contest such mutual mistake, as alleged in the answer? A. No.

"3. Is the plaintiff's cause of action barred by the three-year statute of limitation, as alleged in the answer? A. No.

"4. Is the plaintiff's cause of action barred by the ten-year statute of limitations, as alleged in the answer? A. No."

On appeal to the Superior Court, the cause was remanded for another hearing for errors in the admission of evidence; and, from this order the plaintiff appeals, contending that no reversible error was committed on the trial in the county court. Defendants also gave notice of an appeal, but this was abandoned.

Parrish & Deal for plaintiff.

Swink, Clement, Hutchins & Feimster for defendants.

STACY, C. J. The plaintiff, Catharine A. Barton, inherited several valuable pieces of real property from her father, Phillip Hopkins. In 1901, she conveyed to her husband, A. A. Barton, a life estate in one of these tracts of land. Later this property was sold, and in 1912, the plaintiff conveyed another lot to her husband, intending to provide a home for him during his lifetime only, but by mutual mistake, or the mistake of the draftsman, the deed did not limit the estate conveyed to one for life. Upon its face, the deed conveys a fee simple. Plaintiff's husband died in 1925, without child or children him surviving. This action is brought by his widow against his heirs at law to reform the deed or to correct the mistake.

Plaintiff testified, over objection, that in 1912, when the deed in question was executed, she took the deed, which she had executed in 1901 conveying a life estate to her husband in the first tract, to a justice of the peace and asked him to draw a deed for the second tract "just like the other one," and upon assurance from the justice of the peace that the deed he had prepared was just like the first one and conveyed only a life estate to her husband, she signed the same, not knowing or thinking that it was a deed in fee simple.

Due to the admission of this evidence, over objection by the defendants, the Superior Court deeming it to be incompetent under C. S., 1795, the cause was remanded for another hearing, as provided by the act creating the Forsyth County Court. *Chemical Co. v. Turner,* 190 N. C., 471; *Smith v. Winston-Salem,* 189 N. C., 178.

On cross-examination, and, of course, without objection, the plaintiff was asked if her husband was present at the time of her conversation with the justice of the peace. She answered in the affirmative. Then the following question was asked her: "And you handed the deed to your husband after this conversation with Mr. Lehman (justice of the peace), didn't you?" To which she replied: "Yes, sir." The cross-examination of the witness was first had in the absence of the jury and later offered in evidence by the defendants. There was other evidence tending to support the plaintiff's view of the case.

It will be observed that the plaintiff had testified to no personal transaction or communication between herself and her husband, since deceased, until she was asked the direct question on cross-examination as to whether she handed the deed in question to her husband. *In re Will of Mann, ante,* 248. It is the holding of a number of cases, in keeping with the language of the statute, that the personal transaction or communication about which the interested witness may not testify is one between the witness and the deceased, and not one between the witness and a third person, even though the transaction or communi-

cation took place in the presence of the deceased. *Zollicoffer v. Zollicoffer,* 168 N. C., 326; *Worth v. Wrenn,* 144 N. C., 656; *Lehew v. Hewett,* 138 N. C., 6; *Johnson v. Cameron,* 136 N. C., 243; *Watts v. Warren,* 108 N. C., 515; *Bunn v. Todd,* 107 N. C., 266; *Norris v. Stewart,* 105 N. C., 455; *McCall v. Wilson,* 101 N. C., 598.

The case of *Smith v. Moore,* 142 N. C., 277, strongly relied on by appellees, is not at variance with this position. There the plaintiff was not allowed to testify to a personal conversation between herself and the attorney for the decedent, had in his presence; because, as said by *Walker, J.,* in delivering the opinion of the Court: "The result is that where an attorney acts or speaks for his client, or an agent for his principal in their presence, the one is by the law thoroughly identified with his client and the other with his principal, as much so as if the attorney or agent had not been present at all and the client or principal had acted for himself, or the existence of the former had been merged into the latter."

Likewise, we think the other cases cited by the defendant are distinguishable from the one at bar. It would only be a work of supererogation to point out the various differences.

Speaking to the question in *White v. Evans,* 188 N. C., 212, it was said: "We think a fair test in undertaking to ascertain what is a 'personal transaction or communication' with the deceased about which the other party to it cannot testify is to inquire whether, in case the witness testify falsely as to what transpired between them, the deceased, if living, could contradict it of his own knowledge. *Carey v. Carey,* 104 N. C., 171. Death having closed the mouth of one of the parties, it is but meet that the law should not permit the other to speak of those matters which are forbidden by the statute. Men quite often understand and interpret personal transactions and communications differently, at best; and the Legislature, in its wisdom, has declared that an *ex parte* statement of such matters shall not be received in evidence. Such is the law as it is written, and we must obey its mandates."

Furthermore, it would seem that the defendants ought to abide the consequences of the evidence elicited by their cross-examination. But we deem it unnecessary to discuss this view of the case.

There was error in remanding the cause for a new trial.

Reversed.

LOTTIE E. LEWIS, TREASURER OF WAKE COUNTY, v. BOARD OF COMMISSIONERS OF WAKE COUNTY ET AL.

(Filed 3 November, 1926.)

1. Roads and Highways—Bonds—County Commissioners—Loan of Funds—County Treasurer—Contracts—Custody of Funds—Statutes.

Where a county has issued bonds (C. S., 3634 *et seq.*), for the purpose of lending their proceeds to the State Highway Commission, to be used for the construction of certain highways within the county, and the county commissioners have such proceeds on hand, they may designate the banks in which they are to be deposited (C. S., 3634, 3655), and mandamus by the county treasurer will not lie for control of the funds as a part of the general county funds coming within her control, under the provisions of the statute. C. S., 1393.

2. Same—Mandamus.

Mandamus will not lie against public officials to compel the performance of an act unless the right is clear and unequivocal, or where its existence is in doubt under a statute relating to the subject.

APPEAL by plaintiff from *Barnhill, J.*, at March Term, 1926, of WAKE.

On 4 August, 1925, the board of commissioners of Wake County entered into a contract with the State Highway Commission, whereby it was agreed that the county would lend to the commission funds not exceeding $1,300,000 for the purpose of paving certain roads in the county, known as Routes 50, 21, 90 and 91. To provide these funds the board ordered that an election be held on 20 October, 1925, to ascertain the will of the qualified voters of the county on the question of issuing bonds of the county in the proposed amount, and a majority of the qualified voters favored the proposition submitted. The bonds were sold for $1,303,250, which amount, less $335,250 paid to the highway commission and $3,042.50 disbursed for necessary and lawful expenses incident to the sale of the bonds, is now in certain banks to the credit of the board of commissioners, acting, they claim, as the county road commission. The plaintiff alleges that she is entitled to the funds; that the board wrongfully withholds the funds from her; and she asks that a writ of mandamus issue ordering the defendants to turn over to her the amount derived from the sale of the bonds.

On the hearing it was adjudged that the plaintiff is not entitled to the relief demanded, that the board of commissioners, acting as the county road commission, is entitled to the custody of the funds, and that the writ of mandamus be denied.

The plaintiff excepted and appealed.

N. Y. Gulley and R. N. Simms for plaintiff.
P. J. Olive and J. W. Bailey for defendants.

ADAMS, J. It is the duty of the county treasurer to receive all moneys belonging to the county. C. S., 1393. The plaintiff alleges that by virtue of this statute she is entitled to the fund derived from the sale of the bonds. Whether she is the proper depositary is the question to be decided.

The statutes relating to general road improvement provide that under certain conditions bonds may be issued by the commissioners of any county for the purpose of laying out, opening, altering, or improving the public roads and bridges of the county, and that all moneys derived from the sale of such bonds shall be deposited by the commissioners in solvent banks paying the highest rate of interest on daily balances. C. S., 3634, 3655. The bonds issued pursuant to the election were sold and the proceeds were deposited in several banks in Wake County to the credit of the board of commissioners. The plaintiff takes the position that these deposits were unwarranted and unlawful because not authorized by section 3655 or any other statute. More particularly, she contends that the Legislature has provided two separate and unrelated systems for the construction and improvement of roads and highways, one applicable to counties (C. S., 3634 *et seq.*), the other, to the State (3 C. S., 3846(a) *et seq.)*; that the fund in question is to be used for the construction and improvement of the State highway system; that counties have nothing to do with the highways of the State; the county commissioners having authority over public roads under their jurisdiction but no control over the construction of the State highways and no responsibility for their maintenance. 3 C. S., 3846(a), 3846(j), (c), (g), 3846(aa), 3846(cc).

On the contrary, the defendants say that the only theory upon which the plaintiff's argument apparently may be based is that the election authorizing the bonds was not held in compliance with section 3634 *et seq.;* that, in fact, the election was held pursuant to these statutes; that the county for the purpose of expediting the improvement of certain highways and of benefiting the county system agreed to lend to the State Highway Commission such sum as, added to funds available for road construction, should be sufficient to complete the proposed work; and that this procedure has received judicial approval.

It may be well to note that the following recitals appear in the judgment: The fund in controversy was derived from the sale of certain bonds issued by virtue of and under authority of an election held under section 3634 *et seq.;* the election was regularly and duly held; according to the provisions of section 3655 the commissioners designated cer-

tain solvent banks as depositories of this fund, and that the purpose of the bond issue was to advance money under a contract with the highway commission for the construction and improvement of parts of the highway system in Wake County.

In *R. R. v. McArtan,* 185 N. C., 201, it is said that a county primarily is required to construct and keep up its roads and bridges and that as the commissioners are authorized by 3 C. S., 3846(ee) to contract with the highway commission in reference to the construction of roads, it is their duty, so far as they are legally empowered, to provide the funds necessary for such purpose. In a later case the Court said that although special legislation may disclose a purpose to supervise and control the matter of roads by other boards, county commissioners, unless clearly forbidden by such legislation, may lend proper aid by appropriating general county moneys for this purpose. *Lassiter v. Comrs.,* 188 N. C., 379. And again: "Where there is no legislation providing otherwise, the boards of county commissioners are charged with responsibility for the construction and maintenance of the public roads in their respective counties; . . . that these governmental agencies, the boards of county commissioners and the State Highway Commission, are vested with power to enter into contracts for the construction of roads forming a part of the State highway system and the purpose of the act of 1921, ch. 2, is to encourage coöperation between the highway commission and the county authorities." *Young v. Highway Commission,* 190 N. C., 52.

Granted that the routes for the improvement of which the bonds were issued are parts of the highway system, and that the two systems are not mutually dependent, the contract between the board of commissioners and the highway commission is not for that reason invalid; and as it was adjudged that the bonds were issued by virtue of an election held under section 3634 *et seq.,* it would seem that the funds pending final disbursement should be deposited as provided in section 3655 —these two sections being a part of chapter 70, Art. 4, of Consolidated Statutes and relating to the same subject. At any rate, in the absence of direct authority to the contrary, we are of opinion that the plaintiff is not entitled to the relief demanded. Mandamus will issue only when the enforcement of a clear legal right is sought; it will not issue to enforce an alleged right which is doubtful. *Bernardin v. Duell,* 172 U. S., 576, 43 L. Ed., 559; *Umstead v. Board of Elections, ante,* 139; *Person v. Doughton,* 186 N. C., 723; *Person v. Watts,* 184 N. C., 499.

The judgment is

Affirmed.

MRS. S. C. PULLIAM v. GEORGE O. HEGE, EXECUTOR.

(Filed 3 November, 1926.)

Evidence—Deceased Persons—Cross-Examination — Statutes — Transactions and Communications—Appeal and Error—Objections and Exceptions.

It is incompetent as a transaction with a deceased person (C. S., 1795), in an action against his estate to recover for services rendered him under a contract, for the plaintiff to testify as to personal services rendered by her as coming within her demand for damages, though brought out on her cross-examination, when the answer so elicited was not necessarily called for and exception was duly entered.

APPEAL by plaintiff from *Oglesby, J.*, at September Term, 1926, of FORSYTH.

Civil action to recover for board and services rendered Mrs. Emma Stevenson, now deceased, tried in the Forsyth County Court, where verdict and judgment was entered in favor of plaintiff; and on appeal to the Superior Court the cause was remanded for another hearing for error in the admission of evidence. From this order, the plaintiff appeals, contending that no reversible error was committed by the county court.

Parrish & Deal and W. J. Swaim for plaintiff.
Swink, Clement, Hutchins & Feimster for defendant.

STACY, C. J. The plaintiff, in her original complaint, sought to recover of the defendant the sum of $3,304.00 for services rendered Mrs. Stevenson during her lifetime. Later the amount was changed to $6,500.00. On cross-examination, the plaintiff was asked why she had practically doubled her demand? Her answer was that she had omitted one year's account, and her services were really worth more.

In further explanation, the witness continued: "I done so much for her (objection as this involves a personal transaction; overruled; exception); I had to wait on her, 'tote' meals to her (objection; overruled; exception); I done everything I could for her and she promised me something and I thought I ought to have something." Motion to strike out; overruled; exception.

This evidence related to a personal transaction or communication between the interested witness and the deceased. It was, therefore, incompetent under C. S., 1795. The fact that it was limited to an explanation of why the plaintiff amended her complaint and asked for a larger sum does not render it competent. The statute excludes it for all purposes.

We do not think the defendant "opened the door" by asking plaintiff for an explanation as to why she had changed the amount of her demand. *Williams v. Cooper,* 113 N. C., 286. The question related to a matter which took place after the institution of the present suit.

The cause was properly remanded for a new trial.

Affirmed.

GEORGE W. MOTE ET AL. v. WHITE LAKE LUMBER CO.

(Filed 3 November, 1926.)

1. Deeds and Conveyances—Contracts—Timber.

Deeds for standing timber conveys a fee simple interest in such timber determinable as to all such timber that is not cut and removed within the time specified in the contract.

2. Same—Extension Period—Option—Payment of Consideration.

Where a deed conveys timber growing upon land to be cut and removed within a stated time, with extension periods upon a further consideration to be paid within each of such periods or at stated times, the contract for each such period is but an option until the consideration is paid, and such consideration so to be paid, is necessary for the acquisition by the vendee of the extension rights accorded him.

3. Equity—Estoppel—Deeds and Conveyances—Timber Deeds—Extension Periods.

Where the rights to cut and remove timber growing upon lands are acquired by purchase and conveyance from the original grantee, who agrees and covenants to pay the consideration for the extension periods therein granted, the vendor is estopped in equity from claiming forfeiture of the extension period and a revesting of the title in himself, by asserting to his vendee's purchaser that all moneys necessary to secure this extension had been paid by the original grantee and knowingly permitting extensive operations to be made for the continued cutting and removal of the timber.

4. Same—Recovery of Extension Price—Consideration.

Where equity will estop the grantor in a timber deed from enforcing a forfeiture of the rights of the purchaser of his vendee in cutting and removing the timber, etc., because of his vendee's failure to pay the consideration of the extension period, the vendor may recover the amount of this consideration from such purchaser.

CIVIL ACTION, tried before *Daniels, J.,* at April Term, 1926, of BLADEN.

This action was instituted on 8 February, 1926, by the plaintiff and his wife against the defendant.

On 22 January, 1906, Silas Norris conveyed to E. W. Boatright certain rights to cut and remove timber from the land now owned by the plaintiffs. Boatright conveyed his interest under said timber deed to the Bell Lumber Co. Thereafter, the Bell Lumber Co. conveyed the timber rights to the defendant, White Lake Lumber Co. Norris died and his land was divided among his heirs at law, and under said division the plaintiffs became the owners of certain lots of the Norris land.

In the deed from the Bell Lumber Co. to the defendants, White Lake Lumber Co., appears the following covenant: "And we, the grantors herein, hereby jointly and severally covenant and agree, binding ourselves, our heirs, executors, administrators, successors and assigns, to pay out of our own funds at the proper times to the proper parties all extension money required to keep all the timber deeds hereinbefore mentioned in full force and effect, save only that in all cases where a longer period than seven years from and after the extension maturing date in the year 1918 has been, or may hereafter be granted, all extension money becoming due after the lapse of such period of seven years shall be payable by the grantee, out of its own or their funds."

On 12 May, 1922, the plaintiffs executed and delivered to the defendant a timber deed for the timber on the lots of the Norris land owned by the plaintiffs, assuring to the defendant "the right to cut the timber and exercise the rights, easements, etc., upon so much of the Silas Norris land as is now owned by them (plaintiffs) until said date of 22 January, 1931, the final limit of the extension period." This conveyance executed by the plaintiffs contained a clause as follows: "And whereas, under the terms of said deed, by the Bell Lumber Co. to the White Lake Lumber Co. the said Bell Lumber Co. agreed to pay all extension moneys that might accrue, due upon the timber as described in said deeds of Silas Norris to E. W. Boatright up to and including 22 January, 1926; and whereas, the said George W. Mote, as owner of that portion of the original tracts of land on which the timber was sold as hereinbefore described, has received full payment of all extension money to which he is entitled on account of his ownership of a portion of said original tracts up to and including 22 January, 1926," etc. The said deed from plaintiffs to defendant, after describing the property contained a further clause as follows: "Upon condition, however, that should said timber be not cut and removed on or before 22 January, 1926, then the said White Lake Lumber Co. shall pay to George W. Mote, his heirs or assigns, the sum of $100.00 per annum for each year of said additional period after 22 January, 1926, in advance of or before 22 January of each year of said additional five-year period," etc.

The plaintiffs contended that under the terms of the deed to the defendant that there was the sum of $100.00 extension money due them

on 22 January, 1926, and that said extension money had not been paid by the defendant as required by said contract, and that, as the defendant had entered upon the land and built a tramroad thereon and had begun cutting and removing the timber without the payment of said extension money that the defendant should be restrained from further cutting the timber, and also should be required to pay the plaintiffs for the timber already cut upon said premises.

Angus Cromartie, agent of defendant, testified that a few days prior to 22 January, 1926, he read a deed from the plaintiffs to the White Lake Lumber Co., which contained a clause reciting that the plaintiffs had received all the extension money up to and including 22 January, 1926, and that in order to be entirely certain about the matter he approached the plaintiff, G. W. Mote, and stated to him that he desired to stake out a right of way across the land referred to, and "asked Mr. Mote if he contended that anything was to be paid him by the White Lake Lumber Co. for the year 1926 under the terms of the deed of 12 May, 1922?" George W. Mote "then told him that he had been paid for the year 1926, and that nothing was or would be due or owing to him on that account by the White Lake Lumber Co.; and thereupon said Mote showed (witness) the route that he preferred the tramroad of defendant should take across said land, and helped to pick out a place across said land to put the tramroad." The witness further testified that the plaintiffs had full knowledge of all the defendant was doing, saw from day to day the progress of the work, and never gave any intimation that they had or would have any claim adverse to the rights of the defendant until 8 February, 1926, when this action was instituted.

The evidence of defendant was not contradicted by the plaintiffs so far as the record discloses. The defendant, in his answer, denied its liability to the plaintiffs, but offered, however, to pay the sum of $100.00 extension money in dispute. This offer was declined by the plaintiffs.

The trial judge rendered the following judgment: "This cause, coming on to be heard and being heard at this term, and the court being of the opinion that the language of the deed or contract referred to in the second article of the complaint is such that a forfeiture of the defendant's title to the timber in controversy should not be declared, it is ordered, adjudged and decreed that the restraining order heretofore issued herein be and the same is hereby dissolved, and that the prayer of the plaintiffs for a perpetual injunction be and the same is denied.

It is further ordered, adjudged and decreed that the plaintiffs have and recover of the defendant the sum of $100.00 and interest thereon from 22 January, 1926, and the cost of this action to be taxed by the clerk.

It is further ordered, adjudged and decreed that the defendant do enter into, execute and deliver to the clerk of the court a good and solvent bond in the sum of $1,500.00, in favor of the plaintiffs herein and providing indemnity for them against loss or damage on account of cutting and removing the timber in controversy and exercising the rights and privileges provided for in the deed or contract already referred to herein in the event they should finally be adjudged and entitled to such damages, which bond shall be approved by said clerk."

From the judgment so rendered plaintiffs appealed.

E. F. McCulloch and A. McL. Graham for plaintiffs.
J. Bayard Clark for defendant.

BROGDEN, J. Deeds for standing timber convey a fee-simple interest in such timber, determinable as to all such timber as is not cut and removed within the time specified in the contract. *Austin v. Brown,* 191 N. C., 624.

In *Timber Co. v. Wells,* 171 N. C., 262, *Justice Hoke,* in discussing the nature and effect of extension clauses in timber deeds, says: "The cases on the subject are to the effect, further, that a stipulation of the kind now presented, providing for an extension of the time within which the timber must be cut, is in the nature of an option, and it is held by the great weight of authority that contracts of this character do not of themselves create any interest in the property, but only amount to an offer to create or convey such an interest when the conditions are performed and working a forfeiture when not strictly complied with."

Upon this principle of law, the plaintiffs assert that, as the defendant did not pay the extension money as required in the deed, the right to cut the timber terminated on 22 January, 1926.

It will be observed that in plaintiff's deed to defendant it was recited that the plaintiff "has received full payment of all extension money to which he is entitled on account of his ownership of a portion of said original tracts up to and including 22 January, 1926. The said deed contained a further clause providing that if the timber should not be cut and removed before 22 January, 1926, then the defendant "shall pay to George W. Mote, his heirs or assigns the sum of $100.00 per annum for each year of said additional period after 22 January, 1926, in advance of or before 22 January of each year of said additional five-year period." The payments provided for in the contract were annual payments. If a payment had been made on 22 January, 1926, such payment under the terms of the contract, would have extended the period of cutting until 22 January, 1927. Plaintiff's deed to the de-

fendant was dated 12 May, 1922, and it would seem clear that, if on 12 May, 1922, the plaintiffs had been paid up to and including 22 January, 1926, the extension money for 1926, had, as a matter of fact, been paid in advance as provided in the second clause of the deed between the parties.

But, however this may be, the plaintiffs are not entitled to recover by reason of the application of the principle of estoppel. The undisputed evidence is that the agent of defendant called upon the plaintiffs prior to 22 January, 1926, in order to ascertain if any extension money was due the plaintiffs. The plaintiffs assured the defendant that they had been paid for the year 1926, and that "nothing was or would be due or owing to them on that account by the White Lake Lumber Co." In addition to this positive statement by the plaintiff, he pointed out to the defendant a place to locate his tramroad, and, with apparent approval, permitted the defendant to build said tramroad over the land, move his machinery and other equipment thereon and to begin cutting and removing timber in the usual way.

The ultimate and final question, therefore, is whether or not such conduct and statements on behalf of plaintiffs create an equitable estoppel.

Bispham on Equity (5 ed.), sec. 282, defines equitable estoppel as follows: "Equitable estoppel, or estoppel by conduct, has its foundation in the necessity of compelling the observance of good faith; because a man cannot be prevented by his conduct from asserting a previous right, unless the assertion would be an act of bad faith towards a person who had subsequently acquired the right. It is the presence of this bad faith, either in the intention of the party or by reason of the result, which would be produced if he were permitted to deny the truth of his statement, that distinguishes this species of estoppel from estoppel at common law." This principle was approved by *Justice Walker* in *Boddie v. Bond,* 154 N. C., 369.

In *Wells v. Crumpler,* 182 N. C., 358, *Justice Walker* reasserts and enlarges the principle as follows: "We cannot imagine a case where the doctrine of equitable estoppel could more justly have been applied than to this one. Where a party who has, or claims, a right, either openly and unequivocally abandons it, or does not assert it when he should do so, and induces another by his silence or conduct to believe that the right does not exist, or that he makes no claim to it, if he has it, and abandons and surrenders it, and the other party, acting upon such conduct as it was intended that he should do, and is induced thereby to do something, by which he will be prejudiced, if the party who so acted is permitted to recall what he has done, equity steps in

and protects the party thus misled to his prejudice, and will forbid the other to speak and assert his former right, when every principle of good faith and fair dealing requires and even demands, that he should be silent." *Mfg. Co. v. Building Co.,* 177 N. C., 104.

In *Cromartie v. Lumber Co.,* 173 N. C., 712, the defendant offered to pay plaintiff the extension money more than once prior to the expiration of the period specified in the contract. The plaintiff said, "he was not going to charge it; that he had been paid for the timber . . . and would not require anything more." The court held "that the plaintiff could still collect extension money, but that he could not, after leading defendant to believe that he would waive the extension money, treat it as a trespasser and sue for the value of the timber cut during the extension period." Whereupon, judgment was entered against the defendant for the extension money due under the contract, from which judgment plaintiff appealed to the Supreme Court. The judgment so rendered was upheld, the Court holding that "while waiver is not in the proper sense of the term a species of estoppel, yet where a party to a transaction induces another to act upon the reasonable belief that he had waived or will waive certain rights, remedies or objections which he is entitled to assert, he will be estopped to insist upon such rights, remedies or objections to the prejudice of one misled."

The facts in the *Cromartie case, supra,* and the principle of law declared therein are decisive of this appeal. The decision in the *Cromartie case* was *per curiam,* but such an opinion carries all the force of a formal utterance. *Hyder v. Henderson County,* 190 N. C., 663.

For the reasons given we hold that the judgment should be

Affirmed.

MANUFACTURERS' OIL AND GREASE CO. v. T. S. AVERETT.

(Filed 3 November, 1926.)

1. Contracts—Fraud—Deceit—Evidence—Actions—Defense—Burden of Proof.

Where the vendee's defense to an action upon a contract of sale of goods is fraud and deceit, the burden of proof is on him to show it only by a preponderance of the evidence.

2. Same—Jury.

It is reversible error to withhold from the jury the issue of fraud or deceit set up in defense of an action upon a contract of purchase of goods, when there is any legal evidence thereof construed in the light most favorable to the plaintiff.

3. Same—Written Contracts—Parol Evidence.

The rule that one who can read or write, with full opportunity to do so, may not sign the written instrument and afterwards seek to set it aside for fraud in its procurement contrary to the express terms of the instrument, does not apply when the person signs under the assurance of the vendor's agent that the writing expressed truly the terms they had agreed upon, and conditions at the time were such as to render the reading thereof of great inconvenience, and the signature of the purchaser was wrongfully secured upon the "honor" of the agent that it was correctly written.

4. Same—Rule of Prudent Man—Evidence—Questions for Jury.

Upon the defense of fraud and deceit interposed to an action upon the purchase and sale of goods, and under the evidence the question is presented as to whether an ordinarily prudent man would have signed as purchaser under the circumstances of the case, an issue arises for the determination of the jury.

APPEAL by defendant from *Devin, J.*, at February Term, 1926, of GRANVILLE. Reversed.

The plaintiff brought this action in a court of a justice of the peace for the recovery of $24.75, alleging a sale and delivery of 33 gallons of Ford automobile oil, at 75 cents a gallon, less a credit for freight. Contract given in writing for same by defendant.

The defendant denied the right of plaintiff to recover any sum whatever on the ground that he had contracted to buy only 5 gallons of oil, and that the figures 33 gallons, were fraudulently inserted in the contract without his knowledge or consent, and that the 5 gallons of oil which he had ordered had never been delivered to him.

The justice of the peace rendered judgment for the amount claimed by plaintiff, and defendant appealed to the Superior Court. On the trial in the Superior Court, the defendant, T. S. Averett, testified as follows: "I think it was in November, 1924, that a representative of the Manufacturers' Oil and Grease Company came to see me. I was in the barn stripping tobacco one evening late in a mighty big rush to get it ready to sell it the next day. He came in and told me he was representing some oil company, and I asked him how much he was selling, and he said thirty-three gallons. I told him I did not have anything but a Ford car and I did not need that much. I told him I would take five gallons. We did take five gallons, and when he made out the order I looked it over and said, 'I can't see and I am trusting to your honor. It is for five gallons, I suppose,' and he said 'Yes.' I signed it but I could not see. I thought it was for five gallons. I told him why I could not see. It was dark and mighty near sundown, if it was not sundown, and I did not have my glasses. We were two hundred or two hundred and fifty yards from my house. I told him

I would have to send to the house and get my glasses. I supposed it was for five gallons. I told him I trusted to his honor when I took the paper. If I had known it was an order for twenty-five gallons I would not have signed it. He called it a drum. I always thought it was for five gallons until it came, and I got a notice it was thirty-three gallons waiting for me at the office. I had some correspondence with the Manufacturers' Oil and Grease Co. when I got that notice. The oil was shipped to me, but I did not use it. I have a letter from the Manufacturers' Oil and Grease Co. in regard to this." Witness produced a letter dated 15 January, 1925, from the Manufacturers' Oil and Grease Co., of which the following is an excerpt. "We have your letter of recent date and note your remarks that you have purchased only five gallons of oil from our salesman, Mr. T. R. Harper. Of course we are surprised to receive such a letter as you have sent us, Mr. Averett, and no doubt you are correct when you state that you have ordered only five gallons." "I think the letter came after the oil arrived. I certainly did rely upon this statement of the salesman that the contract was for five gallons. If I had known that it was for a greater amount I would not have signed the order. I could not read the order without my glasses. I remarked that I would have to send to the house to get my glasses, and he said it was for five gallons, that was all." Question by judge: "Did he do anything to keep you from getting your glasses?" Answer: "I was in a hurry, and he seemed to be in a hurry, and it was getting dark, and he said it was for five gallons." On cross-examination the witness testified: "I signed that order, but here is where he done me, over here somewhere (indicating on contract). I signed here. The agent did not do anything to prevent me from seeing it. I trusted to his honor when I asked him if it was for five gallons, and he said it was for only five gallons. He did not do anything to keep me from reading the paper. I told him I trusted to his honor. It was two hundred or two hundred and fifty yards from my house."

The testimony of B. H. Averett, son of defendant, was to the same effect as T. S. Averett.

No counsel for plaintiff.
A. W. Graham & Son for defendant.

CLARKSON, J. To defeat the alleged contract, the defendant sets up actionable fraud or deceit in the procurement of the contract. The court below was of the opinion that defendant's evidence was not sufficient to be submitted to the jury upon an issue of fraud. We cannot so hold. On the issue of fraud, the burden is on the defendant to satisfy the jury of the fraud by the greater weight of the evidence or a pre-

ponderance of the evidence. *McNair v. Finance Co.,* 191 N. C., 715. Not so where it is proposed to correct a mistake in a deed or similar cause—the *quantum* of proof. The evidence must be clear, strong and convincing. *Speas v. Bank,* 188 N. C., p. 528.

Where there is *any* evidence, it is the duty of the court below to submit it to the jury, and the weight of such evidence is for the jury to determine. On the issue of fraud set up by defendant, the evidence is to be taken in the light most favorable to him and he is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom.

In *Boyden v. Clark,* 109 N. C., 669, it is said by the Court: "If a prudent person, in the exercise of ordinary care and occupying his position, would, by prosecuting his inquiries further or extending his investigations, have ascertained the truth before acting, relief would be refused on the ground of negligence."

In *Taylor v. Edmunds,* 176 N. C., p. 328, it is said: "The mere fact that a grantor who can read and write signs a deed does not necessarily conclude him from showing, as between himself and the grantee, that he was induced to sign by fraud on the part of the grantee, that he was deceived and thrown off his guard by the grantee's false statements and assurances designedly made at the time and reasonably relied on by him."

Ordinarily a person who signs a paper-writing, if he can read, it is incumbent on him to do so or have it read to him. *Colt v. Kimball,* 190 N. C., p. 172.

In that case the defendant was above the average in education, was on the board of education in his county for years, and a farmer on a large scale and man of business experience wider than the average farmer. He was at his home when the contract was signed and made no effort to have the contract read. The print was fine, his glasses were not strong enough. "Agent did not do anything particular to keep me from reading the contract." This evidence was held not sufficient to establish fraud.

In *Lumber Co. v. Sturgill,* 190 N. C., 780: "Defendant could read and write. The contract was discussed by paragraphs with F. B. Duane, and when agreed upon J. L. Henderson would write it on the typewriter. When finished, each were given a copy and defendant read it over before signing." This was held not sufficient to establish fraud.

Defendant's evidence succinctly: Late in the evening, it was dark and mighty near sundown, defendant was in his barn stripping tobacco. He was in a mighty big rush to get it ready to sell next day. Plaintiff's agent came to the barn representing plaintiff oil company. Defendant asked him how much he was selling and he said thirty-three gallons.

Defendant told him he had a Ford car and did not need that much, but would take five gallons. When the agent made out the order he looked it over, and defendant said to the agent, "I can't see, and I am trusting to your honor. It is for five gallons I suppose," and the agent said "Yes." Defendant signed it, but could not see. He told the agent why he could not see; it was dark, mighty near sundown, and he did not have his glasses. They were at his house 250 yards away and would have to send for them. He relied on plaintiff's salesman's statement that the contract was for five gallons. Question by judge: "Did he do anything to keep you from getting your glasses? Answer: I was in a hurry, and he seemed to be in a hurry, and it was getting dark, and he said it was for five gallons."

In *Leonard v. Power Co.,* 155 N. C., p. 14, *Allen, J.,* well says: "We are not disposed to modify the principle laid down in *Dellinger v. Gillespie,* 118 N. C., 737, and many other cases, that the law will not relieve one who can read and write from liability upon a written contract, upon the ground that he did not understand the purport of the writing, or that he has made an improvident contract, when he could inform himself and has not done so. 'The law aids those who are vigilant, not those who sleep on their rights.' This rule cannot be invoked, however, in behalf of one who induced sleep and lulls to security, nor does it require men to deal with each other upon the presumption that they are rascals," and quotes as follows from *Walsh v. Hall,* 66 N. C., p. 239: "No specific rule can be laid down to what false representations will constitute fraud, as this depends upon the particular facts which have occurred in each case, the relative situation of the parties and their means of information. Examples are given in the books which have established some general principles which will apply to most cases that may arise. If the falsehood of the misrepresentation is *patent* and a party accepts and acts upon it with 'his eyes open,' he has no right to complain. If the parties have equal means of information, the rule of *caveat emptor* applies, and an injured party cannot have redress, if he fail to avail himself of the sources of information which he may readily reach, *unless he has been prevented from making proper inquiry by some artifice or contrivance of the other party.*" He quotes and approves the charge of the judge in the court below (now *Associate Justice Adams)* as follows: "It is true that a person who can do so is generally required to read a paper before signing, and his failure to do so is negligence for which the law affords no redress. This rule does not apply, however, in case of positive fraud or false representation made by another party, by which the person signing the paper is lulled into security or thrown off his guard and prevented from reading it, and induced to rely upon such false representations of fraud."

The principle of rescission and cancellation for fraud—all the elements of fraud must exist.

There are various and sundry definitions of fraud. See *Furst case, supra; McNair v. Finance Co., supra; Corley Co. v. Griggs, ante,* p. 173.

In *Dunbar v. Tobacco Growers,* 190 N. C., at p. 610, it is said: "In an action between the original parties to an instrument, as here, if it be made to appear that one induced the other to execute a paper-writing upon his misrepresentation as to its contents, and the representation turns out to be untrue and fraudulently made, the party who relied upon it, to his injury, if he acted with reasonable prudence in the matter, is not bound to him who deceived him into executing the instrument. *Furst v. Merritt, ante,* 403."

Did the defendant, in not reading or having the instrument read to him, act as a prudent man under all the facts and circumstances of the case, or was he on his own testimony guilty of negligence? We think this was a matter for the jury.

Savage, C. J., in *Bixler v. Wright,* 116 Maine Rep., p. 139, says: "The law dislikes negligence. It seeks properly to make the enforcement of men's rights depend in very considerable degree upon whether they have been negligent in conserving and protecting their rights. But the law abhors fraud. And when it comes to an issue whether fraud shall prevail or negligence, it would seem that a court of justice is quite as much bound to stamp out fraud as it is to foster reasonable care."

As the testimony is fully set forth, we will not comment on it, as the case goes back so that it may be passed on, under proper instructions, by a jury.

Reversed.

W. V. BROWN, LEM BROWN, ISAAC BROWN, O. W. BROWN AND DEWEY BROWN v. G. W. MOBLEY.

(Filed 3 November, 1926.)

Roads and Highways—Cartways—Ways of Necessity—Statutes—Evidence—Questions for Jury.

Where there is evidence tending to show that the plaintiffs' lands are situated off of a public highway, with a cartway thereto of great inconvenience, and the board of road supervisors have ordered that a proposed way, more convenient and shorter in distance be laid off, and have held that such way is necessary, reasonable and just, and an appeal has been taken by the owners of the land from this order, and the owners of the lands condemned have further appealed to the Superior Court: *Held,* under the enabling amendments of chapter 135, Public Laws of 1921, and chapter 73, Public Laws, Extra Session of 1921, to 1 C. S., 3836 (now 3 C. S., 3836), that a new and improved passage way may be

opened when the old one has become practically impassable or unreasonably inconvenient, an issue arises for the determination of the jury as to whether sufficient reasons exist for the proposed way, and a judgment of the lower court that the plaintiffs are not entitled to it as a matter of law, is reversible error.

APPEAL by plaintiffs from *Bond, J.*, at March Term, 1926, of DUPLIN. Reversed.

Material facts will be considered in the opinion.

Stevens, Beasley & Stevens for plaintiff.
Gavin & Boney for defendant.

CLARKSON, J. This is a petition to the board of supervisors of Cypress Creek Township, Duplin County, by plaintiffs who are cultivating or settled upon certain land, describing same, to which there is leading no public road, to lay out and open a cartway from the residence of plaintiff, W. V. Brown, southward over the land of defendant, G. W. Mobley, to Mill Swamp public road, at or near the dividing corner between the lands of the said Mobley and W. V. Brown, on said public road near the Brown schoolhouse.

The supervisors, after notice, as is required by law, heard the petition and decided *"that said cartway is necessary, reasonable and just,"* and ordered a jury summoned, according to law, to lay out same.

The defendant appealed from the finding and order of the supervisors to the board of county commissioners of Duplin County. The county commissioners adjudged that the petitioners are entitled to the cartway as prayed for, and approved the order of the supervisors and ordered the sheriff of the county to summon a jury of five freeholders to view the premises and lay off the cartway, not less than 14 feet, and assess the damages that defendant may sustain thereby, and make their report, etc. From the order of the board of county commissioners defendant appealed to the Superior Court.

The facts: O. W. Brown and his sons own four farms, adjacent to each other, which they are cultivating. There is *no public road* leading to same. The nearest public road is what is known as the Mill Swamp Public Road, which runs to the south and these farms forming the right angle of a square. The petitioners are entirely shut off from said public road by landowners lying between them and the public road. The distance from the southern edge of the petitioner's lands to the public road going south is one-fourth mile, the distance from the east edge of one of the petitioners' lands to the public road, going east is one-half mile. There are two ways from the lands of the petitioners to the public road, one leading in a northeast direction over lands of

others to the said public road, and across which there are two gates. The other way leads south from said lands of petitioners, and then eastward, southward and westward, in a horseshoe shape, around the respondent, Mobley's land, and then southward between said Mobley's land and another person's, to the said public road, at a point on same where the church and school used by petitioners and families are located. The proposed cartway would cross the Mobley land for 113 yards. This would make a straight road and would be 300 yards nearer than the road now traveled by the petitioners. The way leading out to the northeast would make the schoolhouse and the church a mile from the petitioners, with two gates on the same. The proposed new road would occupy something like one-tenth of an acre of defendant's land.

It is contended by defendant that the petitioners have occupied these farms for about forty years, and, during all of that time have had, unmolested and undisturbed, two outlets to the public road, both of which they have been using all the while until the filing of this petition, and, in reality, are using the same now, it being a one-fourth of a mile from the edge of the petitioners' land to the public road going south, and going east one-half mile; and the purpose of this petition is to change the course of one of these outlets in order that they may shorten the distance (and go across defendant's land) one hundred and thirteen yards, and make the outlet straight, which, if permitted to be done, will cut the lands of the respondent, Mobley, into shoestrings, and thereby render practically worthless the small farm which he owns.

The defendant cites the case of *Farmer v. Bright,* 183 N. C., p. 655 *(Hoke, J.,* writing the opinion). A full citation we do not think bears out defendant's contention. It is there said: "While a petitioner who already has an outlet to a public road, reasonably sufficient for the purpose, is not allowed to have an additional or different cartway established, merely because a shorter and better route can be shown, we are of opinion that on the facts as they now appear of record, the plaintiff is entitled to have the question referred to a jury as to whether sufficient reasons exist for the proposed way. It will be noted that the proceedings are instituted *under Public-Local Laws 1921, ch. 291, and not under the general statutes on the subject. C. S., 3836 et seq.* Under a similar special statute, and on substantially similar facts, the Court, in *Cook v. Vickers,* 144 N. C., 312, held that the question of whether sufficient reasons had been shown must be determined by the jury, having due regard for the rights of all persons interested in the matter, and we consider that case decisive of the question as presented on this appeal. The cases referred to and relied upon by the appellee, of *Warlick v. Lowman* (103 N. C., 122), 104 N. C., 403, and others, were

decisions construing the general statute on the subject. It is not necessary now to determine whether the strict interpretation of the general statute as it prevailed in those authorities has not been modified by the rulings of *Cook v. Vickers, supra,* for, as stated, these proceedings are instituted under the *local law,* and the disposition of the case is controlled by the later decision." (Italics ours.)

Rhodes v. Shelton, 187 N. C., p. 716, is also cited by defendant. It is there said: "It appearing from the evidence, without sufficient denial, that there is a public road leading to the cultivated land of the petitioner, and there being no sufficient evidence to show that said proposed cartway is 'necessary, reasonable and just,' judgment was entered on motion of respondent, dismissing the petition as in case of nonsuit. In this we find no error. C. S., 3836, and cases cited thereunder." See *Gorham v. R. R.,* 158 N. C., p. 504.

The first decision, *supra,* is construing a special statute, and the second the general statute, C. S., 3836. The old section, 1 C. S., 3836, 1919, has been amended twice: (1) Public Laws 1921, ch. 135; (2) Public Laws, Ex. Session, 1921, ch. 73 (3 C. S., (1924), sec. 3836). Public Laws, Ex. Session, 1921, *supra,* provides that where there is no provision in the law for a board of supervisors in a township, relief may be had by petition to county commissioners, etc., and further amends C. S., 3836 by adding the following: *"Provided,* that wherever any private passageway that has been in use has become *practically impassable or unreasonably inconvenient, a new* or *improved passageway* or *cartway* may be opened, within the discretion of the board in charge of the public roads, in the township in which said passageway or cartway lies, in accordance with the purport and procedure of this section."

Upon the close of the evidence, defendant moved for judgment as in case of nonsuit, C. S., 567, which was granted by the court below. Where there is *any* evidence, it is the duty of the court below to submit it to the jury, and the weight of such evidence is for the jury to determine. On motion as in case of nonsuit, the evidence is to be taken in the light most favorable to plaintiffs and they are entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom.

The only assignment of error by plaintiffs is the judgment of nonsuit rendered by the court below. In this we think there was error. Nowhere in the briefs of counsel or the record can we find any reference to the amendment to C. S., 3836 by Laws of 1921, Ex. Session, above referred to. In the old law "it shall appear necessary, reasonable and just that such person shall have a private way to a public road," etc. The amendment *proviso* goes further and whenever any private passageway that has been in use and has become *practically impassable or un-*

reasonably inconvenient, a *new* or *improved* passageway or cartway may be opened," etc. This amendment was no doubt passed to give more convenient outlet to farmers and others "settled upon or cultivating any land" to the new and improved State highways (established by Public Laws 1921, ch. 2), and other county highways that were contemplated being built by legislative acts. It may be noted that a highway commission for Duplin County was created by Public-Local Laws 1921, ch. 447, and ch. 338 was an act to authorize issue of bonds for construction of roads in Duplin County. Similar road acts were passed all over the State for new and improved roads. To make better grades, to cross streams, to go over and under railroads, etc., the new and improved highways, in many instances have to be changed, and the passageways or cartways leading to the public roads for convenience must of necessity be altered, and the enabling statute here considered, no doubt, was passed to meet the new and changing conditions. With the improved public highways came automobiles, and under the proviso, *supra,* it was no doubt the intention of the Legislature that new or improved passageways included grade roads for automobile use, could be built, taking into consideration the topography of the land. For ingress and egress more convenient roads had to be constructed by the farmers and others living off the public highway to their homes. No doubt all these new conditions coming to pass, entered into the enabling act, which should be liberally construed. Home-owning in the country should be encouraged in every way—better homes, with convenient roads leading to them. The statute especially provides a jury of landowners to assess the damage the defendant may sustain and give him "just compensation."

In passing, it may be noted that the statute is not limited to persons "settled upon or cultivating any land," but extends further: "or shall own any standing timber, or be working any mines or minerals, or be conducting or operating any industrial or manufacturing establishment or plant, or taking action looking to the erection, equipment, and operation of any such establishment or plant, to which there is leading no public road, or which is not convenient to water affording necessary and proper means of ingress thereto and egress therefrom, and it shall appear necessary, reasonable and just that such person shall have a private way to a public road or watercourse or railroad over the lands of other persons, he may file his petition before the board of supervisors of the township at a regular or special meeting, praying for a cartway, tram or railway to be kept open across such other persons' lands, leading to some public road, ferry, bridge, public landing or watercourse or railroad." 3 C. S., (1924), sec. 3836, Public Laws, ch. 135.

In accordance with the position here taken, the case, upon proper instructions, must be submitted to a jury.

This new act seems not to have been called to the attention of the careful judge who tried the case.

The nonsuit is

Reversed.

STONE SHIPP, BY HIS NEXT FRIEND, N. R. SHIPP, v. UNITED STAGE LINES, INC., AND SAFETY COACH LINES, INC.

(Filed 3 November, 1926.)

1. **Negligence—Automobiles—Collisions—Instructions—Evidence— Questions for Jury—Appeal and Error.**

   Where there is allegation and evidence tending to show that the plaintiff was injured by the negligence of the defendant's driver of its auto-passenger bus upon a public highway, negligently driving at a high speed upon an auto-bus of another line, causing the driver of the other bus to back his bus off the road and strike the plaintiff, and thus cause the injury in suit, it is reversible error to the plaintiff's prejudice for the trial judge, in his instructions to the jury, to make the question of negligence of the first line to depend solely upon whether there was an actual collision of the busses.

2. **Election of Remedies—Trials—Appeal and Error—Burden of Proof—Record.**

   While the plaintiff in an action to recover damages for a negligent personal injury may not elect upon the trial to hold only one of the two defendants liable, and upon appeal seek to hold the other liable also, the record on appeal must show that he had chosen to try the case in the Superior Court upon the theory that only the negligence of one of the defendants caused the injury in suit.

3. **Appeal and Error—Instructions—Record—Statement of Facts by the Judge.**

   An instruction of the court based upon the judge's statement of fact not supported by the evidence appearing of record, and not conceded by the party adversely concerned, will not effect an error of law committed in the instructions to the jury, according to the record evidence in the case sent up.

4. **Negligence—Personal Injuries—Infants—Measure of Damages—Parent and Child—Earnings of Child—Appeal and Error—Instructions.**

   While one entitled to damages negligently caused by the act of another may recover the present cash value of such sum as will compensate him past, present and prospective, this rule must be limited, when the plaintiff so receiving the injuries is an unemancipated infant, supported by his father, his next friend in the action, to such compensation as will continue after he has reached his majority, the father being entitled to

the infant's earnings, etc., before that time, and an instruction that fails to observe this limitation as to the amount of recovery is reversible error.

BROGDEN, J., having been of counsel, took no part in the consideration of decision of this appeal.

APPEAL by plaintiff and the defendant, United Stage Lines, Inc., from *Schenck, J.*, at June Special Term, 1926, of DURHAM.

Civil action to recover damages for an alleged negligent injury, tried upon the following issues:

"1. Was the plaintiff, Stone Shipp, injured by the negligence of the defendant, United Stage Lines, Inc., as alleged in the complaint? Answer: Yes.

"2. Was the plaintiff, Stone Shipp, injured by the defendant, Safety Coach Lines, Inc., as alleged in the complaint? Answer: No.

"3. Did the plaintiff, Stone Shipp, by his own negligence, contribute to his own injury, as alleged in the answer? Answer: No.

"4. What damages, if any, is the plaintiff, Stone Shipp, entitled to recover of the defendants? Answer: $22,000.00."

From a judgment on the verdict in favor of plaintiff against the defendant, United Stage Lines, Inc., and exculpating the defendant, Safety Coach Lines, Inc., from liability, the plaintiff and the United Stage Lines, Inc., appeal, assigning errors.

Brawley & Gantt for plaintiff.

Biggs & Broughton for defendant, United Stage Lines, Inc.

Brooks, Parker & Smith and Fuller, Reade & Fuller for defendant, Safety Coach Lines, Inc.

PLAINTIFF'S APPEAL

STACY, C. J. The plaintiff appeals only from the verdict on the second issue and that part of the judgment which exculpates the defendant, Safety Coach Lines, Inc., from liability.

It appears that on 24 November, 1924, about 5 o'clock in the afternoon, the plaintiff, a boy 14 years of age, was standing on the side of the Raleigh-Durham highway, in front of his father's home near Nelson, when he was injured by a bus of the United Stage Lines, Inc., as it backed off the highway in order to avoid a collision with a bus owned and operated by the Safety Coach Lines, Inc., or was hit and knocked off the highway by the said last named bus. The drivers of both busses were charged with negligence which contributed to and proximately produced plaintiff's injuries. The allegation of the com-

plaint, as amended, in this respect is to the effect "that the driver of the bus of the Safety Coach Lines, Inc., negligently, recklessly, and with wanton disregard for the rights of the public, and the plaintiff, continued to bear down upon said bus owned and operated by the United Stage Lines, Inc., at a terrific and reckless rate of speed, and struck the bus operated by the United Stage Lines, Inc., somewhere on the right side of said bus and near the front of same, whereupon the driver of the bus of the defendant, United Stage Lines, Inc., suddenly and simultaneously and at or about the moment the bus driven by him was struck by the bus of the Safety Coach Lines, Inc., without any warning, recklessly and wantonly shot said bus back across the road in the direction of the plaintiff," striking him and injuring him, etc.

Under this allegation—the evidence being both ways as to whether the two busses actually collided—the trial court instructed the jury, "as a matter of law, that if they failed to find by the greater weight of the evidence that the Safety Coach bus did hit the bus of the United Stage Lines, Inc., they would answer the second issue 'No.'" This instruction is assigned as error and forms the basis of one of plaintiff's exceptions. We think the exception is well taken.

True, it is alleged that the two busses actually collided. But it is also alleged, giving a liberal interpretation to the complaint, that the bus of the Safety Coach Lines, Inc., "continued to bear down upon the said bus owned and operated by the United Stage Lines, Inc.," causing the driver of the latter bus suddenly to back off the road, thereby negligently injuring the plaintiff; and there is evidence tending to support as well as to refute this allegation. Its weight, of course, is a matter for the jury. "The plaintiff is entitled to recover any relief to which the facts alleged in the complaint and the proof entitle him to receive." *Clark, C. J.,* in *Henofer v. Realty Co.,* 178 N. C., 584. See, also, *McCulloch v. R. R.,* 146 N. C., 316; *Gilliam v. Ins. Co.,* 121 N. C., 372; C. S., 506.

Appellee, the Safety Coach Lines, Inc., says, however, that the plaintiff, by his deliberate allegation of a collision, thereby selected the ground upon which he was willing to wage battle; that he has had a fair chance of winning on his chosen field; that he thought it wise to risk his fortunes on a single strong position rather than take another also which might tend to weaken it; and that he ought not to be given another chance, after losing, to shift his ground to some other position, which he had not taken when he had a fair opportunity to do so. *Webb v. Rosemond,* 172 N. C., 848; *Allen v. R. R.,* 119 N. C., 710. This is undoubtedly a sound position, for it is well established that a party to a suit may not change his position with respect to a material matter

during the course of litigation. *Hill v. R. R.*, 178 N. C., 612; *Lindsey v. Mitchell*, 174 N. C., 458. Especially is this so where the change of front is sought to be made between the trial and appellate courts. *Ingram v. Power Co.*, 181 N. C., 359; *Coble v. Barringer*, 171 N. C., 445. A party is not permitted to try his case in the Superior Court on one theory and then ask the Supreme Court to hear it on another and different theory. *Warren v. Susman*, 168 N. C., 457.

But in answer to appellee's position, we think it is sufficient to say that the fact, if such it be, is not made to appear on the record, and we find nothing in the case which would seem to limit the plaintiff to the allegation of an actual collision. It is true, his Honor told the jury that the only allegation of negligence in the complaint was "that the bus of the Safety Coach Lines, Inc., negligently crashed into the bus of the United Stage Lines, Inc., and knocked it against the plaintiff," but this is not conceded by the plaintiff, and the instruction itself forms the basis of one of his exceptions on appeal.

The plaintiff is entitled to a new trial as against the defendant, Safety Coach Lines, Inc., and it is so ordered.

New trial.

APPEAL OF DEFENDANT, UNITED STAGE LINES, INC.

STACY, C. J. Numerous exceptions are presented by the appeal of defendant, United Stage Lines, Inc., but we shall not consider them *seriatim*, as we find it necessary to award a new trial for error in the charge on the measure of damages.

As bearing on the issue of damages, the following instruction forms the basis of several exceptive assignments of error:

"In this class of cases, if the plaintiff is entitled to recover at all he is entitled to recover as damages one compensation—in a lump sum—for all injuries, past, present and prospective in consequence of the defendants' negligent acts. These are understood to embrace indemnity for actual nursing or medical expense, and loss of time or loss from inability to perform labor or capacity to earn money. The plaintiff is to have a reasonable compensation, if he is entitled to recover at all, for the loss of both bodily and mental powers and for actual suffering, both of body and mind, which are the immediate and necessary consequences of the injury. And it is for you, gentlemen of the jury, to say under all the circumstances what is a reasonable and fair sum which the defendants should pay to the plaintiff, by way of compensation, for the injury he has sustained. The age of the plaintiff, his occupation, the nature and extent of his ability to work, his earning capacity at the

time of the injury or whether he was employed or not or whether he was able to go to school or not, are all matters to be considered by the jury."

This charge is almost in the identical language of the Court's opinion in the case of *Ledford v. Lumber Co.*, 183 N. C., 614, with the exception that in the *Ledford case* the following was added: "The award is to be made on the basis of a cash settlement of the plaintiff's injuries, past, present and prospective." And this was further amplified in *Murphy v. Lumber Co.*, 186 N. C., 746, where it was said: "Defendant's position in regard to limiting the damages, if any, which may accrue in the future to the present cash value or present worth of such damages is undoubtedly the correct one, for if the jury assess any prospective damages, the plaintiff is to be paid now, in advance, for future losses. The sum fixed by the jury should be such as fairly compensates the plaintiff for injuries suffered in the past and those likely to occur in the future. The verdict should be rendered on the basis of a cash settlement of the plaintiff's injuries, past, present and prospective." See, also, *Fry v. R. R.*, 159 N. C., 362; *Penny v. R. R.*, 161 N. C., 528; *Johnson v. R. R.*, 163 N. C., 431.

But the present case is distinguishable from those cited above, in that the plaintiff is a minor, fourteen years of age, living with his parents. This suit is brought by his father as next friend. It seems to be the universal holding that an unemancipated infant cannot recover, as an element of damages in an action for personal injuries, for loss of time or diminished earning capacity during his minority. *Hayes v. R. R.*, 141 N. C., 195, 31 C. J., 1114; *Comer v. Lumber Co.*, 59 W. Va., 688, 8 Anno. Cas., 1105, and note. The father is entitled to the services and earnings of his minor child so long as the latter is legally in his custody or under his control and not emancipated. *Floyd v. R. R.*, 167 N. C., p. 59; *Williams v. R. R.*, 121 N. C., 512; 29 Cyc., 1623.

The charge is defective in that it fails to limit the plaintiff's recovery to the present worth of a fair and reasonable compensation for his mental and physical pain and suffering, if any, and for his permanent injuries, if any, resulting in the impairment of his power or ability to earn money after reaching his majority. *Murphy v. Ludowici Gas and Oil Co.*, 96 Kan., 321, 150 Pac., 581; *Cincinnati, etc., Ry. Co. v. Troxell*, 143 Ky., 765, 137 S. W., 543.

In the case from Kentucky, just cited, it was held that a minor railway employee, not manumitted, could recover only for his mental and physical pain and suffering, if any, and for the permanent impairment, if any, of his power to earn money after arriving at the age of twenty-one years, and not for loss of time during his minority.

In regard to the assignments of error directed to the refusal of the court to grant the defendant's motion for judgment as of nonsuit, made first at the close of plaintiff's evidence, and renewed at the close of all the evidence, we deem it sufficient to say that, in our opinion, the evidence was such as to require its submission to the jury. As a new trial must be awarded, we omit any discussion of the testimony.

New trial.

BROGDEN, J., having been of counsel, took no part in the consideration or decision of this case.

RUSSELL ET AL. v. CITY OF WILMINGTON ET AL.

(Filed 3 November, 1926.)

1. **Rewards—Criminal Law—Evidence—Issues—Questions for Jury.**

Where the proper municipal authorities have offered a reward for the arrest and conviction of the one who has committed a murder, and there is evidence tending to show, and *per contra*, that the plaintiff by persuasion had induced the one afterwards convicted of the offense to go with him in his automobile, and thus delivered the murderer to the municipal authorities: *Held*, the rights of the plaintiff to the reward was properly made to depend upon whether the plaintiff's persuasion had induced the murderer to give himself up, or whether he had otherwise voluntarily done so, the issue to be determined by the jury under conflicting evidence.

2. **Appeal and Error—Instructions—Rewards.**

Where the trial judge in his charge considered contextually as a related whole and not disjointedly, correctly and unmistakably instructs the jury as to the plaintiff's right to recover a reward offered for the arrest and conviction of a murderer, it will not be considered as reversible error, that taking the charge disjointedly error may be made to appear.

CIVIL ACTION for reward before *Midyette, J.*, at April Term, 1926, of NEW HANOVER.

On 28 July, 1924, Leon George and Samuel Lilly, officers of the law, were killed in Brunswick County, at about 7:00 o'clock p.m. On 30 July, 1924, the governing authorities of the city of Wilmington passed a resolution "that reward be offered by the city of $500 for the arrest and conviction of the party or parties who committed the murder, and that the acting mayor, Commissioner Thompson, request the Governor to offer an additional reward upon the part of the State, and that a similar request be made to the county commissioners." This offer of

reward was published in the newspaper on 31 July, and was posted in public places in Brunswick County. One of these notices was posted at the store of the plaintiff, Kennedy.

On 30 July Elmer Stewart was arrested and charged with the murder of these two officers. A posse was organized to find C. W. Stewart, father of Elmer Stewart, who, with his son, was suspected of having committed the crime.

The plaintiff, Kennedy, testified "that on Thursday after the killing he sent a message to C. W. Stewart that the best thing for him to do was to surrender." The witness could not state that Stewart ever received this message. The witness further testified: "That night I got a message from C. W. Stewart, in consequence of which, on Friday, I told Mr. Russell (coplaintiff) that Stewart wanted me to take him to Southport to the sheriff." On cross-examination the witness testified: "I got a message from Stewart Thursday night. The message was, he wanted me to come to him and take him to Southport. He did not tell me where to come. He wanted to give himself up, but wanted us to guarantee protection." The witness further testified that the plaintiffs met Stewart in consequence of the message he had sent to them and persuaded him to surrender. Stewart first said "that he didn't know whether he ought to go with us or not, and we talked it over about their having his boy, and I told him it was best for him to go, and that he had just as well get in. While Amos had gone for the gun we were persuading him all the time, and he finally agreed to go if we could protect him from the Wilmington crowd. He was afraid they would hang him." Stewart got in the car with the plaintiffs, and on the way to Southport they met the officers, who took charge of Stewart and lodged him in jail. At the time the sheriff took charge of Stewart he said, "If I am convicted of this charge I want Mr. Kennedy and Mr. Russell to have the reward."

Stewart was thereafter tried for murder, convicted and electrocuted.

The plaintiffs testified for the State at the trial.

There was evidence on behalf of defendant tending to show that the officers had had several conversations with plaintiff, Kennedy, and that he had never at any time contended that he had in any way persuaded Stewart to accompany him to Southport.

The sheriff of New Hanover County testified that from the time of the homicide up to the time of the surrender of C. W. Stewart no assistance was given the State by either of the plaintiffs.

The theory of the defendant was that plaintiffs were friends of Stewart and were trying to protect him, and that Stewart, being convinced that escape was impossible, had definitely decided to surrender himself to the officers.

The following issues were submitted: (1) Were the plaintiffs induced by, and did they in consequence of the reward offered, arrest C. W. Stewart? (2) Did the plaintiffs, after the publication of the reward, effect the arrest of C. W. Stewart? (3) Did the plaintiffs furnish information to the officers or court, or give evidence in the trial, that led to his conviction? The jury answered the first issue, no, and the second issue, no.

From the judgment upon the verdict, plaintiffs appeal.

C. Ed Taylor for plaintiffs.
K. O. Burgwin for defendant.

PER CURIAM. The terms of the reward provided "for the arrest and conviction of the party or parties who committed the murder." The only question in the case was one of fact, whether or not the plaintiffs arrested Stewart.

The trial judge charged the jury: "If the plaintiffs in this action have satisfied you from the evidence and by its greater weight, the burden being upon them to do so, that they induced or persuaded C. W. Stewart to surrender his body and person to them, and under their persuasion he went to an automobile and got in it with them and went on with them, and they delivered him to the sheriff of Brunswick County, and that was effected and accomplished by persuasion exercised by the plaintiffs over C. W. Stewart, that would be a lawful arrest of C. W. Stewart. If, on the other hand, you find from the evidence in this case that C. W. Stewart voluntarily went with them of his own free will and volition, and was not induced or persuaded by them to do it, why then that would not be an arrest."

At another place in the charge it appears that the trial judge used this language: "Or that they persuaded C. W. Stewart to give himself up, and that in consenting to surrender to the authorities the said Stewart did so *only* upon the persuasion and enticement of plaintiffs."

The plaintiffs insist that the word "only" contained in this charge is error. But in the same paragraph was the following language: "So that if you should find from the evidence that the said Stewart voluntarily surrendered himself of his own free will and accord and it was not in consequence of any force or persuasion used by the plaintiffs, then and in that event, plaintiffs would not be entitled to recover, and you should answer the first two issues, no."

The charge as a whole could not have misled the jury.

In *Currie v. Swindall*, 33 N. C., 361, *Pearson, J.*, says: "There can be no question as to the truth of the proposition asserted; for, if the

man surrendered himself of his own accord, without any force or persuasion on the part of the plaintiff, then he has not performed the services for which the reward was offered."

The rule of law applicable was properly submitted to the jury, and the judgment is sustained.

No error.

C. E. HUNTER, SEYMORE FAW, J. A. PIERCE AND OTHERS, DESIRING TO BECOME PARTIES PLAINTIFF, v. LEE ALLMAN, OR LEE ALLMAN CONSTRUCTION COMPANY, INC., W. A. WILLIAMS, HAMP BURGESS AND JOS. W. CALLAWAY.

(Filed 3 November, 1926.)

Roads and Highways—Public Works—Materialmen—Laborers—Principal and Surety—Actions—Indictment—Criminal Law.

A civil action for damages will not lie against special road supervisors of a county, either as an obligation of the county or against the supervisors individually, for failing to take the bond required for material furnishers or laborers under C. S., 2445, as amended by ch. 100, Public Laws of 1923, the remedy prescribed being by indictment of the latter in their individual capacity.

APPEAL by defendants, W. A. Williams, Hamp Burgess and Jos. W. Callaway, from *Lyon, J.*, ASHE Superior Court. Reversed.

No counsel for plaintiff.
T. C. Bowie for defendants.

PER CURIAM. The complaint alleges that the defendants, W. A. Williams, Hamp Burgess, and Joseph W. Callaway, were special road commissioners of Ashe County. That they contracted with Lee Allman or Allman Construction Company, Inc., to build a highway in Ashe County from, at or near Othello postoffice to, at or near Obids postoffice, for contract price of $24,000. That they (Williams, Burgess, and Callaway) failed, neglected and refused to require from said Lee Allman, or Allman Construction Company, Inc., a bond in the amount specified in chapter 49, C. S., 2445, as codified from chapter 150, sec. 2, Public Laws of North Carolina, Session 1913; ch. 191, sec. 1, Public Laws of 1915, and also chapter 100, Public Laws of 1923; and failed, neglected and refused to provide any security whatever for the labor and material on said road, and failed, neglected and refused to comply with the laws of North Carolina, with respect to the letting of contracts for public improvements. That the amount of bond re-

quired by said statute of defendants Lee Allman or Allman Construction Company, Inc., was $7,500, sufficient, as plaintiffs are advised, informed and believe, to cover the work and labor and material on said road.

That plaintiffs performed work and labor on the road, and the specified amounts due for same are set forth in the complaint.

The defendants, W. A. Williams, Hamp Burgess, and Joseph W. Callaway, demurred to the complaint, which was overruled by the court below.

C. S., 2445, in part, is as follows: "If the official of the said county, city, town or other municipal corporation, whose duty it is to take said bond, fails to require the said bond herein provided to be given, he is guilty of a misdemeanor."

The statute provides the remedy by indictment. The very matter was decided contrary to the contentions of plaintiffs in *Noland Co. v. Trustees,* 190 N. C., p. 250. On authority of that case, the judgment overruling the demurrer cannot be sustained. As to the liability of the road commissioners, in their individual capacity, see, also, *Latham v. Highway Commission,* 191 N. C., p. 141; *Lowman v. Comrs., ibid.,* 152.

Reversed.

WILLIAM WADFORD ET AL. v. D. W. DAVIS ET AL.

(Filed 10 November, 1926.)

1. **Executors and Administrators—Statutes—Assets—Creditors—Petition to Sell Lands—Actions—Procedure.**

Where the executor of the decedent has proceeded under the provisions of C. S., 74, to sell the realty to make assets to pay debts, and has filed his petition as required by C. S., 79, it being made to appear that the personalty was insufficient, and the proceedings are still pending, the surplus of the sale is to be regarded as realty to be distributed among the devisees, C. S., 56, and a judgment creditor of a devisee desiring to attack a debt set forth in the petition as being in fraud, and thus diminishing their distributive share of the estate, they should do so in these proceedings, and not by independent action.

2. **Same—Ex Parte Proceedings—Parties—Judgments—Independent Actions.**

Where the executor has filed a proper petition for the sale of realty to pay debts (C. S., 79), the judgment creditors interested in the surplus, if not made parties, and desiring to contest one of the debts set out in the partition for fraud, may make themselves parties and proceed therein accordingly, the procedure being *ex parte* on the part of the executor (C. S., 759), and an independent action by them will not lie for fraud until after final judgment in the proceedings.

3. Same—Presumptions.

The regularity of the proceedings by an executor to sell lands to make assets to pay debts due by the estate will be presumed in the absence of evidence to the contrary. C. S., 74, 79, 56, 759.

4. Same—Intervenors.

The judgment creditors of the decedent, having an interest in the surplus of the sale of realty to make assets to pay debts, are such necessary or proper parties as to entitle them to intervene in the proceedings of the executor, and make themselves parties, before final judgment. C. S., 456.

APPEAL by plaintiffs from *Barnhill, J.,* March Term, 1926, of WAKE. Affirmed.

This is a civil action brought by William Wadford, Mary Eva Wall, G. G. Wall, J. M. Brewer, trustee in bankruptcy for Wake Grocery Company, and certain other judgment creditors of W. E. Mitchell, against D. W. Davis, W. E. Mitchell, W. E. Mitchell, Executor, W. A. Wall, Lucy A. Wall, N. Y. Gulley, commissioner.

The material allegations are that Mary Mitchell died in June, 1923, leaving a last will and testament duly probated in Wake County and the bulk of her property consisting of real estate was devised to W. E. Mitchell. That W. E. Mitchell was appointed executor of the last will and testament of Mary Mitchell, and has duly qualified and is acting as such. That a special proceeding entitled "W. E. Mitchell, executor of Mary Mitchell, and W. E. Mitchell, Lucy A. Wall, W. A. Wall, *ex parte,*" was commenced in the Superior Court of Wake County before the clerk to sell the land of Mary Mitchell, deceased, to pay certain alleged indebtedness amounting to some $5,500. A part of the indebtedness, a $4,000 note alleged to be given by Mary Mitchell, deceased, to her daughter Lucy A. Wall, "is a false and spurious document and was not in truth or in fact ever executed or delivered by the said Mary Mitchell, deceased." That this $4,000 spurious note was a scheme and pretense to cheat and defraud the creditors of W. E. Mitchell. That the "defendants W. E. Mitchell, D. W. Davis and Lucy A. Wall, wrongfully and fraudulently conspired together to cheat and defraud the creditors of the said W. E. Mitchell and to cause to be executed and put forth the said alleged note," etc. That W. E. Mitchell is insolvent, except what was devised to him by his mother, Mary Mitchell.

The plaintiffs prayed judgment, in part: (1) That defendants be restrained and enjoined from further prosecuting the special proceeding and the commissioner appointed by the court from selling the land, etc. (2) Alleged $4,000 note be declared null and void, etc.

The defendants answer and deny the material allegations of the complaint and for a further answer say: "That the defendants are informed

and believe, and so allege, that the note for $4,000 and interest on it will amount to approximately $4,900. For the funeral expenses, taxes, and other debts, and costs of administration fixed by law, including the $4,000 note and interest, will aggregate about $5,500, and that the order of the clerk of the Superior Court of Wake County was orderly and properly made, and these plaintiffs had no right to interfere with such sale, thus nullifying a judgment of a court of competent jurisdiction; that if the plaintiffs have any cause of action, they should have made themselves parties to the special proceeding now pending before the clerk of the Superior Court, and asserted their right to the fund, which by law remains real estate and subject to judgment liens, after the debts of testatrix are paid. In addition to the amounts above set forth, the will itself provides that Lucy A. Wall be paid the sum of $300, and all other personal property, consisting of household and kitchen furniture, was specifically devised, and it is necessary to sell the land to pay this legacy. Wherefore, the defendants pray judgment: First, That plaintiff's action be dismissed. Second, That the land be sold under the order of the clerk of the Superior Court of Wake County, heretofore made. Third, That the plaintiffs be taxed with the costs incurred by reason of the restraining order. Fourth, That if plaintiffs claim any right to fund arising from the sale of said lands that they be required to assert their rights in the special proceeding now pending in the court of the clerk of the Superior Court."

The court below rendered judgment as follows: "That any right that the plaintiffs, or either of them may have against the defendants, or either of them on account of the matters and things alleged in the complaint could be asserted only in the special proceeding pending before the clerk of the Superior Court of Wake County for the sale of the lands of Mary Mitchell, deceased, to make assets for the payment of the alleged indebtedness of the said Mary Mitchell, deceased, which said special proceeding is referred to in the complaint filed in the cause, and the court being of the further opinion that this court has no jurisdiction to hear and determine the issues raised in the pleadings filed in the above entitled cause and that the complaint does not state a cause of action; and the defendant having demurred *ore tenus* to the complaint, it is ordered and adjudged that said demurrer be, and it is, hereby sustained and that this action be, and is hereby dismissed," etc.

The plaintiffs excepted and assigned as error the judgment rendered, and appealed to the Supreme Court.

Mills & Mills, E. W. Timberlake & Son, Douglass & Douglass and R. N. Simms for plaintiffs.

N. Y. Gulley for defendants.

CLARKSON, J. C. S., 74, is as follows: Sale of realty, if personalty insufficient for debts. When the personal estate of a decedent is insufficient to pay all the debts, including the charges of administration, the executor, administrator or collector may, at any time after the grant of letters, apply to the Superior Court of the county where the land or some part thereof is situated, by petition, to sell the real property for the payment of the debts of such decedent."

C. S., 56, is as follows: Surplus of realty sold for debts is real assets. All proceeds from the sale of real estate, as hereinafter provided, which may not be necessary to pay debts and charges of administration, shall, notwithstanding, be considered real assets, and as such shall be paid by the executor, administrator or collector to such persons as would have been entitled to the land had it not been sold."

An *ex parte* petition was filed in the Superior Court of Wake County before the clerk to sell the land of Mary Mitchell, deceased, to pay her debts. The executor and all the devisees under the will, all being of age, were made parties and an order made appointing a commissioner to sell the land. The contents of the petition for sale must be as follows: C. S., 79. "The petition, which must be verified by the oath of the applicant, shall set forth, as far as can be ascertained: (1) The amount of debts outstanding against the estate. (2) The value of the personal estate, and the application thereof. (3) A description of all the legal and equitable real estate of the decedent, with the estimated value of the respective portions or lots. (4) The names, ages and residences, if known, of the devisees and heirs at law of the decedent."

A license to sell real estate will be granted if the personalty is insufficient for the payment of the debts. It must be shown in a petition to sell land to make assets that the personal estate has been exhausted, or it will be clearly insufficient to pay the debts of the estate. C. S., 74; *Shields v. McDowell,* 82 N. C., p. 137; *Clement v. Cozart,* 107 N. C., 695; *Moseley v. Moseley, ante,* 243.

In *Morris v. House,* 125 N. C., 555, it is said: "It was claimed on the argument for the plaintiffs (and we are not furnished with any argument or brief for defendant), that the sale was made under the second order (May Term, 1864), which order is styled 'John Carson, administrator, etc., and others, *ex parte,*' and the report of sale is styled 'John Carson, administrator, etc., and others, *ex parte,*' and the plaintiffs contend that this of itself shows that they were not parties. We do not assent to this proposition, though the better and more regular way would have been to make the heirs at law of the defendant's intestate parties defendant, yet we do not say that this was absolutely necessary in order to bind the heirs and convey the title. It has been held that it was not. *Harris v. Brown,* 123 N. C. 419, and *Ex parte Avery,* 64 N. C., 113."

C. S., 759, is as follows: *"Ex parte;* commenced by petition. If all the parties in interest join in the proceeding and ask the same relief, the commencement of the proceedings shall be by petition, setting forth the facts entitling the petitioners to relief, and the nature of the relief demanded." C. S., 760, the "clerk acts summarily," etc.

The presumption from the record is that this *ex parte* special proceeding is regular in every respect. From a careful reading of the complaint, there is no allegation that the interlocutory order, ordering the sale made by the clerk was obtained by fraud, nor is there any final judgment in the cause. The whole basis of the complaint is that the $4,000 note made by Mary Mitchell to Lucy A. Wall "is a false and spurious document," and the further allegations charging those who "fraudulently conspired to cheat and defraud the creditors of W. E. Mitchell." So far as the *ex parte* proceeding had gone, at the time of the commencement of this action, there is nothing shown by the record that it was irregular, erroneous or void. *Fowler v. Fowler,* 190 N. C., 536; *Finger v. Smith,* 191 N. C., 818. The action for the sale of the land, under the *ex parte* proceedings was for the payment of the testatrix's debts.

In *Carter v. Rountree,* 109 N. C., 29, it is said: "It is well settled, that pending an action before the *final judgment,* an interlocutory order or judgment may be attacked for fraud by a *motion or proceeding in the action,* but after the final judgment the remedy for fraud is by an independent action brought for the purpose. See the cases cited, *supra,* and other cases cited in Seymour's Digest (7th), p. 281 *et seq.*"

In *Moody v. Wike,* 170 N. C., 544, citing a wealth of authorities, it is said: "When a cause is closed by a *final judgment,* a proper remedy is to proceed by an independent civil action to set it aside if it was procured by fraud."

In *Fowler v. Fowler, supra,* p. 541, it is held: "It is well settled that for fraud perpetrated on a party to the action the judgment must be attacked by an independent action, citing authorities.

The action of plaintiffs is a novel procedure. We can find no precedent like it, or to sustain it. The order appointing a commissioner in the *ex parte* proceeding is interlocutory and not a final judgment, and therefore an independent civil action could not be brought if the interlocutory order was procured by fraud. Plaintiffs do not attack the *ex parte* proceeding, but attack the validity of a note which, if paid, would diminish the estate of W. E. Mitchell, devised to him by his mother Mary Mitchell, and thus effect the quantum of plaintiffs' interest in the land, they being judgment creditors of W. E. Mitchell. They have a lien as judgment creditors of W. E. Mitchell on the land willed him, subject to all valid claims against the estate of Mary Mitchell and subject to his homestead rights.

Part of C. S., 614, defining rights of judgment creditors, is as follows: "And is a lien on the real property in the county where the same is docketed of every person against whom any such judgment is rendered, and which he has at the time of docketing thereof in the county in which such real property is situated, or which he acquires at any time thereafter," etc.

Under C. S., 56, *supra,* the surplus of realty sold for debts is real assets, and paid to such person as would have been entitled to the land had it not been sold.

C. S., 456, in part, is as follows: "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff *or who is a necessary party to a complete determination or settlement of the questions involved,"* etc.

Under our liberal practice, and the facts and circumstances of this case, we think the language of the statute broad and comprehensive enough to permit plaintiffs in the present action to intervene as parties in the *ex parte* proceedings. The settlement of the only question involved is the validity of the $4,000 note. When they become parties and the pleadings raise an issue of fact as to the validity of the note it can be tried out by a jury at term. This does not interfere with the orderly procedure of the sale of the land, but settles the controversy as to the validity of the alleged spurious $4,000 note, and fixes the duty on the executor, W. E. Mitchell, to whom payment should be made out of proceeds derived from the sale of the land. *Jones v. Asheville,* 116 N. C., p. 817.

30 Cyc., p. 127, says: *"Under American Codes.* In other cases, however, and notably in recent cases, these enactments have been interpreted as permitting a very full joinder of defendants. This tendency is especially marked in actions seeking equitable relief. The provisions of The Code, it is declared, adopted the rule of equity joinder in its most liberal form. A community of interest among defendants is necessary, but it is community of interest in something wider than a precise 'subject of action' between plaintiff and each defendant—it is a community of interest 'in the controversy.' There is a noticeable tendency under The Code, as in equity pleading, to treat the rule, not as an inflexible rule of practice or procedure, but as a rule founded in general convenience, which rests upon a consideration of what will best promote the administration of justice without multiplying unnecessary litigation on the one hand or drawing suitors into needless and unnecessary expenses on the other." *Oyster v. Mining Co.,* 140 N. C., 135.

For the reasons given, the judgment of the court below is

Affirmed.

STATE v. HOLT ET AL.

(Filed 10 November, 1926.)

1. **Robbery—Indictment — Highways — Forcible Taking of a Thing of Value—Criminal Law.**

As to the place charged in the offense of highway robbery, it is only necessary for the indictment to charge that it was committed in or near a highway, and that the defendant charged therewith feloniously and forcibly took from the State's prosecuting witness goods or money of any value by violence or putting him in fear, etc.

2. **Same—Statutes—Less Degree of Same Crime—Assault—Evidence—Verdict.**

An assault upon the person is a necessary ingredient to be charged in an indictment for highway robbery, and under an indictment for this offense the lesser degree of crime of an assault with a deadly weapon where a pistol is used, is included in the greater offense charged, and under conflicting evidence as to whether highway robbery or an assault only with a deadly weapon has been committed, the jury may find verdict for the lesser offense. C. S., 4639.

3. **Same—Instructions.**

Where the indictment is sufficient and the evidence is conflicting as to whether the defendant committed highway robbery or an assault with a deadly weapon, the jury may find for the lesser offense, and it is the duty of the trial judge to so instruct the jury, though a special request therefor had not been aptly tendered in writing. C. S., 565, 4639, 4640.

CRIMINAL ACTION before *Redwine, Emergency Judge,* at June Special Term, 1926, of FORSYTH.

The defendants, Bob Holt, Hassell Holt, Byron Gibson and Charles Holt, were tried upon a bill of indictment, charging said defendants with highway robbery in taking from the person of Grady Raines the sum of thirty dollars and assaulting him with a pistol.

There was testimony on behalf of the State tending to show that on or about 26 February, 1926, Grady Raines was traveling from High Point to Winston-Salem. In the car with him were two women, Cora Bacon and Sallie Crump; that as the State's witness, Raines, approached a little filling station about five miles from High Point, opposite the residence of defendant, Byron Gibson, there was an automobile backing out from Gibson's house into the road; that when the car backed out into the road, the defendants got out of the car and one of them called to Raines to come back. Raines went back to where the defendants were standing in the road and testified that defendant, Bob Holt, stated that he was on a scout and did not have any money; that thereupon the defendant, Hassell Holt, struck him with something like a baseball bat, and Bob Holt said, "Give me your money." At that time

Bob Holt had a pistol, and the other defendants, Byron Gibson and Charlie Holt, were standing there in his presence. That thereupon Bob Holt struck him on the head with the pistol and ordered him to hold up his hands, and Hassell Holt struck at him with a stick. Witness further testified that Bob Holt then took a twenty-dollar bill and a ten-dollar bill and some change out of his pocket. At this time the State's witness spoke to the defendant, Gibson, whom he knew, and said, "Are you going to let these boys kill me here?" Thereupon, Gibson put his hands on Raines' shoulders and pushed him through the crowd and told them not to hit this man any more.

The State's witness, Raines, reported the matter to the police officers immediately, and soon thereafter Bob Holt was arrested. At the time of his arrest the defendant, Bob Holt, was asleep in a barn about one hundred yards from the house of the defendant, Gibson. He had a pistol, and upon being searched, the officers found a twenty-dollar bill upon his person.

The defendant, Hassell Holt, was also arrested and a ten-dollar bill was found under his pillow and three one-dollar bills and some change in the pockets of his overalls.

The defendants, Charles Holt and Hassell Holt, testified at the trial. The defendants, Bob Holt and Byron Gibson, did not testify.

The testimony of the defendant was to the effect that the State's witness, Raines, owed Bob Holt some money and that Bob Holt made demand upon him for the money, and that thereupon he paid Bob Holt $30.00, said sum being in the form of a $20.00 bill and a $10.00 bill; that after Raines had paid the defendant, Holt, he started back toward his car at the filling station and cursed Bob Holt, and that thereupon Bob Holt hit Raines with his pistol.

Upon the evidence the defendant contended that there was no robbery at all, but that Raines had paid the money voluntarily to Bob Holt, and that after the money had been paid and Raines was leaving the scene, that he cursed Bob Holt, and that Bob Holt pursued him and hit him over the head with a pistol, and that, under this evidence, the only crime that was committed was assault with a deadly weapon. The defendants, Bob Holt and Hassell Holt and Byron Gibson, were convicted. Bob Holt was sentenced to five years in the State's prison; Hassell Holt to three years, and Byron Gibson to two years.

From the judgment pronounced the defendants appealed.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

M. L. Mott, Jr., for defendants.

BROGDEN, J. At the conclusion of his Honor's charge, counsel for defendants requested the court to charge the jury that if it should be found that the money was paid voluntarily by the State's witness to the defendant, Bob Holt, and that after the payment there was an altercation, and the defendant, Bob Holt, struck the witness with a pistol, that this would constitute only an assault with a deadly weapon. The trial judge stated: "I think my charge fully covers that. I have instructed them that highway robbery constitutes the taking by violence and force, and before you can convict these defendants you must find it was taken by violence and force." Counsel for defendants thereupon addressed this question to the judge: "Did your Honor charge relative to the fact that they could be convicted of assault with a deadly weapon in this matter?" The judge replied, "No, sir."

The only question submitted to the jury by the trial judge in his charge was, whether or not the defendants, Bob Holt and Hassell Holt, or either of them was guilty of robbery, and whether or not Byron Gibson and Charles Holt were present, aiding and abetting in the perpetration of the crime. The charge of the court concluded with these words: "Now, as I stated, gentlemen, you may convict one or all of these defendants as you may find the facts to be, under the charge of the court, or you may acquit the one or all of them, as you may find the facts to be under the charge of the court."

The request of defendants' counsel that the court charge the jury that they could find the defendants guilty of an assault with a deadly weapon was not in writing, and hence did not comply with C. S., 565, and the trial judge was at liberty to disregard it. But, was it the duty of the trial judge, under the evidence, to present that phase of the case, irrespective of a proper request from counsel for defendants?"

C. S., 4639, provides as follows: "On the trial of any person for rape, or any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence warrants such finding, etc."

Lord Mansfield defines robbery thus: "A felonious taking of property from the person of another by force." Blackstone defines it as "the felonious and forcible taking from the person of another of goods or money of any value by violence or putting him in fear."

To constitute highway robbery, it is only necessary to further charge and prove that the crime was committed in or near a highway. *S. v. Burke,* 73 N. C., 83; *S. v. Brown,* 113 N. C., 645. It is obvious, therefore, that the crime charged in the bill of indictment includes an assault against the person, and, this being true, the statute, C. S., 4639, makes it lawful "for the jury to acquit of the felony and to find

a verdict of guilty of assault against the person indicted, if the evidence warrants such finding."

Does the evidence in this case warrant such finding? The evidence for the State makes out a crime for highway robbery only; but the evidence of defendants, if believed, tends to show that there was no robbery at all, for that the State's witness voluntarily paid the money to the defendant, Holt, and, after such voluntary payment, was thereafter assaulted with a deadly weapon. This evidence warranted the submission to the jury, of the question of assault with deadly weapon; and if the evidence, in such cases, warrants it, the trial judge must submit that phase of the case to the jury whether properly requested or not.

In *S. v. Hill,* 181 N. C., 558, the defendant was indicted for assault with intent to commit rape. The evidence was inconclusive as to the intent to commit rape, and, upon the conclusion, counsel for the defendant requested the court to acquit the defendant. In discussing this phase of the case, *Justice Walker* says: "We cannot grant the nonsuit, as the defendant could have been convicted of an assault the same as if it had been separately charged in an indictment. C. S., 4639."

In *S. v. Williams,* 185, N. C., 685, the defendant was charged with rape, and his counsel requested the court to charge the jury that there were five verdicts that might be returned under the indictment, to wit: (1) Rape; (2), assault with intent to commit rape; (3), assault with deadly weapon; (4), assault upon a female; (5), not guilty. The trial judge refused to give this instruction, and the defendant excepted. In discussing this exception, *Justice Walker* says: "The instruction requested by the prisoner should have been given, at least substantially, and if not given, or if it had not been asked for, the judge, of his own motion, should have submitted to the jury proper instructions as to the commission of a lesser offense than that charged in the bill of indictment, and his failure to do so even without an appropriate prayer by the prisoner was error." (Citing C. S., 4639-4640.)

In *S. v. Nash,* 109 N. C., 824, it is held that "where there was a serious conflict between the testimony of prosecutrix and that of defendant, it was erroneous to restrict the jury to either the theory of the State or to that of the defendant, as they may predicate their findings upon a hypothesis not consistent with either theory." *S. v. Merrick,* 171 N. C., 788; *S. v. Allen,* 186 N. C., 302; *S. v. Efird,* 186 N. C., 482.

The attorney-general, with his usual candor and frankness, in discussing the failure of the court to charge the jury as to whether or not the defendants could be convicted of an assault with a deadly weapon, says: "This, in reality, presents a serious question, but we submit that

while the evidence of the prosecuting witness showed an assault with the deadly weapon upon him, that this very assault was part of the means used by the defendant, Bob Holt, to consummate the highway robbery." This identical contention appears in *S. v. Williams,* 185 N. C., 685. The contention was as follows: "The State contends that, while the evidence of the prosecuting witness showed an assault with a deadly weapon upon the prosecutrix, yet this very assault was part of the means used by the defendant to force her." *Justice Walker,* referring to this contention, says: "But we are unable to agree with this contention of the State, or to decide according to it; but our opinion is, and we so hold that the substance, at least, of the prayer should have been given to the jury, and in failing to do so, the court committed an error."

For the error specified, in failing to submit to the jury the phase of the case, involving assault with a deadly weapon, there must be a New trial.

HOGGARD v. BROWN, ADMINISTRATOR.

(Filed 10 November, 1926.)

1. Pleadings—Allegations—Fraud.

Allegations of fraud to disprove that a check accepted in full for services rendered must be sufficiently alleged in the complaint in all its essential elements to admit of parol evidence to the contrary.

2. Same—Evidence.

Evidence of fraud in the procurement of a receipt, in this case written upon a check cashed by the creditor, is erroneously admitted when the allegations of the complaint are insufficient.

3. Same—Debtor and Creditor—Receipts—Checks.

Where the creditor has received a check with entry thereon it was in full for services rendered, allegations of fraud in its procurement, that she could barely more than write her name, without averment that she was so situated as not to have the check read to her or otherwise inform herself of the contents, is insufficient to admit of parol evidence to the contrary.

4. Issues—Verdict—Fraud—Appeal and Error.

Where an issue of fraud in the procurement of a receipt is so interwoven under the evidence and the law of the case, with other issues submitted, that the answers of the other issues are influenced by it, the verdict on the issue of fraud will not be considered as immaterial.

CIVIL ACTION, tried before *Nunn, J.*, at May Term, 1926, of ALAMANCE.

Plaintiff brought an action against the defendant, Brown, administrator of George H. Troxler, alleging that on 1 November, 1923, George H. Troxler, defendant's intestate, being an old man, infirm, and an invalid, moved to her house, and she waited upon him until his death on 27 August, 1924; that on account of the condition of said Troxler, by reason of age and infirmity, it was necessary for her to give nearly all of her time and attention to him in order that he might be properly cared for, and that her services were worth $10.00 a day, aggregating for the whole period the sum of $3,000.00.

The defendant alleged and offered evidence tending to show that he had a contract with plaintiff to care for his intestate, by the terms of which he was obligated to pay the plaintiff $20.00 a week for services rendered the intestate, and also to pay $10.00 a week to Miss Cobb, a nurse who was employed to help plaintiff care for the intestate. Various payments of $20.00 had been made to plaintiff during the period, and on 8 September, 1924, defendant sent a check to the plaintiff in words and figures as follows: "Burlington, N. C., 9-8-1924. No. 1. First Savings Bank 66-637. Pay to the order of Mrs. W. C. Hoggard $20.00—Twenty Dollars insured—Dollars. Services and Board. Geo. H. Troxler, to date. W. W. Brown, administrator for Geo. H. Troxler, m. m. Endorsed on back: "Mrs. W. C. Hoggard, Burtner Furniture Co."

The intestate died on 27 August, 1924, and this check was, therefore, sent some days after his death. The defendant contended that the check, having been received and cashed by the plaintiff, constituted a settlement between the parties. It appears also that the intestate, George H. Troxler, had given to plaintiff a check for $1,000.00 on 30 June, 1924. Plaintiff contended that this check was a gift.

The plaintiff filed a reply alleging: "That if the defendant has a check, as is set forth in the said amended answer, given her for "services and board of George H. Troxler to date," the same was obtained from the plaintiff in this action by false representation, concealment and fraud of defendant with the purpose of cheating her out of her services sued for in this case; that the plaintiff is not an educated woman and is only capable of writing her name, and if any such statement was made upon the face of said check, her attention was not called to it; she did not see it at the time it is alleged that said check was given to her and accepted by her and cashed by her."

Plaintiff testified that she was living in the intestate's house and got her house rent free, and, further, that she endorsed the check of 8 September, 1924, and got the money. Plaintiff further testified, in regard to the check of 8 September, 1924, upon which was the notation referred to, that Mattie Cobb gave her the check, but that she had

no recollection of what was on it. Plaintiff was permitted to testify, over the objection of defendant, that she thought the check was for board only, and that if there was anything on the check that bound her, she did not know it; that she could read and write a little bit and could write her name sometimes so anybody could read it.

The following issues were submitted to the jury: (1) Did the plaintiff receive and endorse the check dated 8 September, 1924, as alleged in the defendant's further defense? (2) If so, was such receipt and endorsement procured by the fraudulent conduct of the defendant, as alleged in the plaintiff's reply? (3) What amount, if any, is plaintiff entitled to recover of the defendant? The jury answered the first issue, no; the second issue, yes; and the third issue, $3,000.00.

There was judgment upon the verdict and the defendant appealed.

R. C. Strudwick, John J. Henderson, John A. Barringer for plaintiff.
Long & Allen, Coutler, Cooper & Carr for defendant.

BROGDEN, J. Was there sufficient allegation of fraud and any evidence thereof, warranting the submission of the second issue to the jury?

It is established law in this State that, in pleading fraud, the facts constituting fraud, must be clearly alleged in order that all the necessary elements may affirmatively appear. *Nash v. Hospital Co.,* 180 N. C., 59; *Lanier v. Lumber Co.,* 177 N. C., 200; *Colt v. Kimball,* 190 N. C., 169.

The only facts alleged as constituting fraud are as follows: "That the plaintiff is not an educated woman and is only capable of writing her name, and if any such statement was made upon the face of said check, her attention was not called to it; she did not see it at the time it is alleged that said check was given to her and accepted by her and cashed by her." This is not a sufficient allegation of fraud. *Colt v. Kimball, supra.*

Nor is there sufficient evidence of fraud to be submitted to the jury. The only testimony relied upon from which fraud could be inferred is that plaintiff testified that Mattie Cobb gave her the last check that had the entry "for services and board of George H. Troxler to date," written thereon, and that she thought it was for board like the other checks that had been given her; that she had no education and that she could read and write a little bit, and that she did not know why the memorandum was written. There is no suggestion that the defendant was present when the check was delivered to her or made any statement to the plaintiff about the check, or in any way or manner prevented her from reading the check or ascertaining its meaning, or hav-

ing the entries thereon explained to her. This testimony of plaintiff constituted no evidence of fraud, and where there is no evidence to support an issue, it should not be submitted to the jury. *Brown v. Kinsey,* 81 N. C., 245; *S. v. Prince,* 182 N. C., 790; *Markham-Stephens Co. v. Richmond Co.,* 177 N. C., 364; *Colt v. Kimball,* 190 N. C., 169; *S. v. Martin,* 191 N. C., 404.

The defendant in apt time requested the court to charge the jury as follows: "I charge you that if you find the facts to be as shown by the evidence in this case, you will answer the second issue, no." His Honor refused to so charge the jury. Under the evidence in this case the defendant was entitled to this instruction. *Markham-Stephens Co. v. Richmond Co.,* 177 N. C., 364.

The plaintiff contends that the second issue was immaterial, but an examination of the record will disclose that the first and second issues were so closely related and interwoven that a consideration of the second issue no doubt had a bearing upon the answer to the first.

There are other serious exceptions as to the effect of the memorandum on the check in controversy, and as to the competency of evidence. We express no opinion as to these exceptions.

New trial.

JOE PASS v. MARY ELIAS.

(Filed 10 November, 1926.)

Summons—Process—Statutes—Courts—Justices of the Peace—Superior Courts—Special Appearances—Motions.

The same requirements as to a proper service of summons in a civil action issuing from the court of a justice of the peace, must be observed by the process officer as from the Superior Court, C. S., 1500, Rule 16, and where a copy thereof is not served at the time of its reading to the defendant, the service is invalid, and the action will be dismissed on special appearance and motion, when the defendant has preserved this right by a like motion in the court of the justice of the peace. C. S., 1487, 1488; 3 C. S., 479.

CIVIL ACTION, before *Webb, J.,* at August Term, 1926, of GUILFORD.

On 17 April, 1925, the plaintiff instituted an action before a justice of the peace to recover of the defendant the sum of $18.00. The return upon the summons is in these words: "Received 24 April, 1925. Served 24 April, 1925, by reading the within summons to Mary Elias. D. B. Stafford, S. E. B. Ballinger, D. S." The defendant, through her counsel, made a special appearance in the court of a justice of the

peace for the purpose of dismissing the action, for the reason that the summons had not been properly served upon the defendant. The justice of the peace denied the motion and proceeded to judgment. The defendant appealed to the Superior Court, properly protecting all rights, and in the Superior Court made a special appearance to dismiss for the reason given in the magistrate's court. The motion was overruled, and the case proceeded to trial over the objection of defendant, resulting in a verdict in favor of plaintiff and against the defendant for the said sum of $18.00. Whereupon the defendant appealed.

No counsel for plaintiff.
Thomas J. Hill for defendant.

BROGDEN, J. The question is this: Must the summons in the court of a justice of the peace be served by delivering a copy to the defendant?

3 C. S., 479, provides that "the officer to whom the summons is addressed must note on it the day of its delivery to him, serve it by delivering a copy thereof to each of the defendants, and return it within the time specified therein for its return, etc."

C. S., 1500, rule 16, provides: "The chapter on Civil Procedure, respecting forms of actions, parties to actions, the times of commencing actions, and the service of process, shall apply to justices' courts."

C. S., 1487, provides for the issuance and form of a summons and the return date in the courts of a justice of the peace.

C. S., 1488, provides that the officer to whom the summons is delivered shall return the same within five days after its receipt.

But neither of these statutes provides a method of serving the process, except the method prescribed in the chapter on Civil Procedure. Indeed, before the passage of the new practice acts, a summons issued by a justice of the peace against a corporation required that service should be made by delivering a copy. This was the identical method prescribed for serving summons in actions commenced in the Superior Courts against corporations.

Construing C. S., sec. 1500, sub-sec. 16, and C. S., 479, together, it is clear that a summons issued from a court of a justice of the peace must be served in the same manner as a summons issued from the Superior Court. As no copy of the summons was left with the defendant, as required by law, the defendant was not properly in court, and the motion to dismiss should have been allowed. *Aaron v. Lumber Co.*, 112 N. C., 189; *Lowman v. Ballard*, 168 N. C., 18; *Hatch v. R. R.*, 183 N. C., 617.

Reversed.

R. S. BUSBEE, TRUSTEE, v. CHARLES A. CREECH, F. K. BROADHURST AND W. H. AUSTIN.

(Filed 10 November, 1926.)

Negotiable Instruments—Endorsers—Notice of Dishonor—Evidence.

Where a negotiable note sued on has the name of the defendant endorsed thereon without indication that he has signed in any other capacity, and he is not notified of its nonpayment at maturity, as the statute requires, C. S., 3086, evidence that he had signed otherwise is incompetent, and he is discharged from liability thereon, C. S., 3044, 3071.

CLARKSON, J., not sitting.

APPEAL by plaintiff from judgment of *Barnhill, J.*, at March Term, 1926, of WAKE.

Action upon note, payable to order of plaintiff, executed by defendant, Creech, and endorsed by defendants, Broadhurst and Austin. The note was not paid at maturity. Judgment by default final was rendered against defendant, Creech, on said note. No notice of its dishonor by nonpayment at maturity was given by plaintiff to defendants, Broadhurst and Austin. They relied upon the failure of plaintiff to give such notice as a defense to plaintiff's action against them as indorsers. Plaintiff contended that no notice of dishonor was required, for that defendants, although indorsers, were primarily liable on the note. From judgment dismissing the action at close of plaintiff's evidence, as upon nonsuit, plaintiff appealed to the Supreme Court.

A. B. Andrews for plaintiff.
Pou & Pou, J. L. Emanuel for defendant.

CONNOR, J. There was no evidence that plaintiff notified defendants, or either of them, of the dishonor of the note by nonpayment at maturity within the time prescribed by statute. C. S., 3086. The note was not protested for nonpayment. Each defendant having placed his signature upon the note otherwise than as a maker, and not having indicated by appropriate words an intention to be bound thereon in some capacity other than as an indorser, is deemed to be an indorser, C. S., 3044, and is liable on the note only as an indorser. The general rule prescribed by statute, C. S., 3071, is that when a negotiable instrument has been dishonored by nonacceptance or nonpayment, notice of dishonor must be given to the drawer or to each indorser, whose liability on the instrument is secondary and not primary; any drawer or indorser to whom such notice is not given is discharged. However notice is not required to be given to indorsers in all cases; for exceptions see

C. S., 3097. It is therein provided that such notice is not required to be given to an indorser "(3) where the instrument was made or accepted for his accommodation."

The burden is upon the holder of a note, seeking to hold liable thereon an indorser, to whom notice of dishonor has not been given, upon the contention that such notice was not required, to prove that the note was made for his accommodation. Parol evidence is not competent to show that the liability of one whose name is written on the back of a note as an indorser is primary, and not secondary, for the purpose of sustaining the contention that notice of dishonor by nonpayment is dispensed with. The liability of one who has indorsed a note, where it is contended that such liability is other than that of an indorser, must be determined by appropriate words contained in the note. C. S., 3044. Where the note does not contain words which indicate an intention on the part of the indorser to be bound thereon otherwise than as an indorser, he is liable as an indorser only. Parol evidence is not competent to show that one who signed his name as an indorser upon a note is liable as an "original promisor" or as surety. *Meyers v. Battle,* 170 N. C., 168.

There are no words in the note offered in evidence by the plaintiff indicating that defendants intended to be bound thereon otherwise than as indorsers. Parol evidence offered by plaintiff to show a contrary intention on the part of defendants was incompetent. No competent evidence having been offered to show that defendants were liable primarily and not secondarily on the note, notice of dishonor, as required by statute, was not dispensed with. As there was no evidence of such notice, the judgment allowing defendant's motion for judgment dismissing the action at the close of plaintiff's evidence as of nonsuit must be

Affirmed.

CLARKSON, J., not sitting.

R. R. RAGAN v. R. A. DOUGHTON, COMMISSIONER, ET AL.

(Filed 10 November, 1926.)

Taxation—Payment of Tax—Actions—Injunction.

The plaintiff's remedy for contesting the validity of the ruling of the State Commissioner of Revenue in erroneously classifying him as one buying and selling real estate under section 30, ch. 101, Revenue Act of 1925, is by paying the tax under protest and suing to recover it. C. S.,

7979, there being no question as to the legality of the tax thus imposed, and there being no element of an equitable nature involved, the remedy by injunction is unavailable. C. S., 858.

APPEAL by plaintiff from *Finley, J.,* at Chambers, 21 June, 1926, from GUILFORD.

Civil action to restrain the collection of a license tax levied under section 30, ch. 101, Revenue Act, Schedule B, Public Laws 1925, it being alleged that plaintiff is not engaged in the business of buying and selling real estate for profit, for which he has been taxed.

A temporary restraining order was issued in the cause, which was later dissolved, and, from the court's refusal to continue the injunction to the hearing, the plaintiff appeals.

D. H. Parsons for plaintiff.

Attorney-General Brummitt and Assistant Attorney-General Allen for defendant.

STACY, C. J. The temporary restraining order was dissolved upon the ground and finding that the tax in question is not illegal or invalid, or levied or assessed for an illegal or unauthorized purpose, and that, therefore, the plaintiff's right to contest its collection, either in whole or in part, is not by seeking an injunction (C. S., 858), but by paying the tax under protest and then suing to recover it back, observing, of course, the requirements of the statute with respect to time, notice, etc. C. S., 7979. We find no error in this ruling. *R. R. v. Comrs.,* 188 N. C., 265.

We think a fair interpretation of the pertinent decisions, construing the statutes applicable, would be to say that where the legality of the tax, or the legality of the assessment, or the purpose for which the tax is assessed or authorized, is not assailed, but the taxpayer merely contends, contrary to the ruling of the Revenue Department, that he does not come within the class taxed, in the absence of circumstances sufficient to invoke the aid of a court of equity, his remedy for determining this controverted question of fact, which challenges only the administration of the law, is not by seeking to enjoin the collection of the tax, but by paying it under protest and then suing to recover it back. *Sherrod v. Dawson,* 154 N. C., p. 528; *Purnell v. Page,* 133 N. C., 129; *Armstrong v. Stedman,* 130 N. C., 217; *Ins. Co. v. Stedman, ibid.,* 221; *Schaul v. Charlotte,* 118 N. C., 733; *Range Co. v. Carver, ibid.,* 328; *Mace v. Comrs.,* 99 N. C., 65; *R. R. v. Lewis, ibid.,* 62.

The ruling of his Honor on the facts appearing of record must be upheld.

Affirmed.

J. H. CROWDER v. THE MURRAY CONSTRUCTION CO., INC.

(Filed 10 November, 1926.)

Appeal and Error—Burden of Proof—Harmless Error.

The defendant cannot successfully complain that in the trial court he was not required to take the burden of the issue in question.

APPEAL by plaintiff from *Webb, J.*, at June Term, 1926, of ROCKINGHAM.

Civil action to recover damages for an alleged negligent injury to plaintiff's automobile, tried in the Forsyth County Court on the following issues:

"1. Was the automobile of the plaintiff damaged by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

"2. Did the plaintiff, by his own negligence contribute to the injury, as alleged in the answer? Answer: No.

"3. What damage, if any, is plaintiff entitled to recover of the defendant? Answer: $350."

On appeal to the Superior Court the cause was remanded for another hearing for errors in the admission of evidence and in the charge. From this order the plaintiff appeals.

A. W. Dunn, Humphrey & Gwyn for plaintiff.
Swink, Clement, Hutchins & Feimster for defendant.

STACY, C. J. A perusal of the record leaves us with the impression that the assignments of error, based on exceptions to the admission of evidence, are without substantial merit. We deem it unnecessary to discuss them, as they present no new question of law.

His Honor sustained an exception to the charge on the ground that the defendant was not definitely required to handle the laboring oar on the second issue, in that, the judge of the county court simply told the jury "if they were satisfied by the greater weight of the evidence that the plaintiff, by his own negligence, proximately brought about his injury, they would answer the second issue Yes; otherwise No," without saying whether the burden of proof, with respect to the issue of contributory negligence, was on the plaintiff or the defendant.

Without deciding whether there was error in the instruction as given, we think it is sufficient to say that, even if erroneous, the defendant is not in position to take advantage of it. The defendant has the burden of proof on the issue of contributory negligence, and, if he were not

required to carry it, the plaintiff alone could complain, not the defendant. *Fleming v. R. R.*, 160 N. C., 196.

We find no reversible error appearing on the record, hence the order remanding the cause for another hearing will be

Reversed.

TAYLOR & FETZER v. R. F. GENTRY.

(Filed 10 November, 1926.)

Judgments — Pleadings — Default — Meritorious Defense — Appeal and Error.

An order of the lower court setting aside a judgment by default will be reversed in the Supreme Court, when it is not made to appear that the defendant has a meritorious defense.

APPEAL by plaintiff from *Lane, J.*, at February Term, 1926, of ROCKINGHAM.

Motion to set aside judgment by default final, rendered by the recorder's court of the town of Reidsville, 13 October, 1925. Motion allowed by the recorder, and this ruling was affirmed on appeal to the Superior Court at the February Term, 1926. Plaintiff appeals.

J. C. Brown for plaintiff.
No counsel appearing for defendant.

STACY, C. J. Plaintiff obtained judgment by default final in the recorder's court of the town of Reidsville on 13 October, 1925. This was set aside fourteen days thereafter, on motion of the defendant, on the ground of "mistake, inadvertence, surprise or excusable neglect," under C. S., 600. On appeal by the plaintiff to the Superior Court the order setting aside the judgment in the recorder's court was affirmed.

Plaintiff takes two positions: First, that the recorder's court was without authority to entertain the motion, and, as the Superior Court could exercise derivative jurisdiction only, it was also without authority to decide the question. *Sewing Machine Co. v. Burger*, 181 N. C., 241. Second, that on the facts found, the defendant is not entitled to have the judgment vacated or set aside.

Without passing upon the merits of the first position, we deem it sufficient to say that there is no allegation or finding of a meritorious defense. It is useless to set aside a judgment where there is no real or substantial defense on the merits. *Land Co. v. Wooten*, 177 N. C., 248; *Norton v. McLaurin*, 125 N. C., 185. "One who asks to be relieved

from a judgment on the ground of excusable neglect must show merit, as otherwise the court would be asked to do the vain thing of setting aside a judgment when it would be its duty to enter again the same judgment on motion of the adverse party." *Allen, J.,* in *Crumpler v. Hines,* 174 N. C., 283.

On the record, there was error in setting aside the judgment.

Reversed.

MRS. ELLA G. HOLCOMB v. W. H. HOLCOMB.

(Filed 10 November, 1926.)

Appeal and Error—Judgments—Default—Findings—Review.

Where the Superior Court judge has made no findings of fact upon which he has refused to set aside a judgment by default for "mistake, inadvertence, surprise or excusable neglect," and the defendant has not requested him to do so, there is nothing before the Supreme Court on appeal upon which it may predicate a decision, and the judgment below will be affirmed.

APPEAL by defendant from *Lyon, J.,* at March Term, 1926, of SURRY.

Motion to set aside judgment by default final, rendered by the clerk of the Superior Court of Surry County on 22 September, 1924. Motion denied, and this ruling was affirmed on appeal to the Superior Court at March Term, 1926. The defendant appeals.

W. L. Reece and J. H. Folger for plaintiff.

W. F. Carter for defendant.

STACY, C. J. This is an appeal from a refusal to set aside a judgment by default final on the ground of "mistake, inadvertence, surprise or excusable neglect," under C. S., 600. The judge, not being requested to do so, found no facts upon which he based his ruling. *Carter v. Rountree,* 109 N. C., 29. In the absence of such finding, it is presumed that the judge, upon proper evidence, found facts sufficient to support his judgment. *McLeod v. Gooch,* 162 N. C., 122. Hence, there is nothing for us to review. *Osborn v. Leach,* 133 N. C., 428. "We do not consider affidavits for the purpose of finding facts ourselves in motions of this sort." *Gardiner v. May,* 172 N. C., 192. It would have been error for the judge not to have found the facts, had he been requested to do so. *McLeod v. Gooch, supra.* But he is not required to make such finding in the absence of a request by some of the parties. *Lumber Co. v. Buhmann,* 160 N. C., 385. See *Norton v. McLaurin,* 125 N. C., 185, for full discussion of the subject.

Affirmed.

ANNIE L. BURTON ET AL. v. KATIE L. CAHILL ET AL.

(Filed 10 November, 1926.)

1. **Tenants in Common—Joint Tenancies—Deeds and Conveyances.**

The incidents of joint tenancy when the right of survivorship applies arises by the contract of the parties, and are of the fourfold character of the same interest acquired from the same party under the same conveyance, commencing at the same time, and held by one and the same undivided possession.

2. **Same—Jus Accrescendi—Survivorship—Statutes.**

The act of 1784, now C. S., 1735, abolishes the right of survivorship in fee, in joint tenancies, but not joint estates for life.

3. **Same—Common Law.**

Where the necessary elements thereof exist in the conveyance of an estate in lands, the law favors the interpretation that a joint tenancy is conveyed under the common-law rule, in the absence of statutory restriction, and of restrictive, exclusive or explanatory words of the conveyance manifesting an intention to create a tenancy in common.

4. **Same—Children—"Per Capita"—"Per Stirpes"—Deeds and Conveyances—Wills.**

A deed or devise of lands to the two daughters of the grantor or testator for life, and then to their children, without particular designation, but as a class, upon the falling in of the particular estate the "children" of the life tenants take *per capita* and not *per stirpes*.

5. **Same—Partition—Statutes.**

Where the life tenants under a deed or will take as joint tenants with remainder over to their children, who take per capita, the life tenants may not have their estate in the lands divided under the provisions of C. S., 3215, 1745.

CIVIL ACTION, before *Webb, J.*, at June Term, 1926, of Superior Court of ROCKINGHAM.

On 14 March, 1924, Annie L. Burton and her children, John A. Burton and Mary Lucy Burton, instituted a partition proceeding against Katie Lewis Cahill and her children, to wit, Myrtle Cahill Bailey, Mary Cahill, Benjamin M. Cahill, Katherine Cahill, and Benjamin M. Cahill, Sr., guardian *ad litem* of Dorothy Jane Cahill, a minor. The plaintiffs allege that they owned a one-half undivided interest in the property in controversy, and that the defendants owned a one-half interest in said property; that all the parties were of age except Dorothy Jane Cahill. The defendants answered, resisting the partition of the land in severalty upon the ground that the title to the property constituted a joint tenancy, and that partition thereof could not be maintained.

The deed for the property in controversy was made by Robert Lewis and wife on 28 October, 1895, and is as follows:

"This deed made this 28 October, 1895, by Robert Lewis and Mary E. Lewis, his wife, of Rockingham County, and State of North Carolina, of the first part, to their daughters, Annie L. Burton and Katie L. Cahill of Stokes County, and State of North Carolina, of the second part:

Witnesseth, That the first party, in consideration of the natural love and affection and a wish to provide for said daughters, have bargained and sold, and by these presents do bargain, sell and convey to said Annie L. Burton and Katie L. Cahill and their children, a certain tract or parcel of land in Mayo Township, Rockingham County, State of North Carolina, adjoining the lands of J. H. Cardwell, James Trent, Jim Adkins, Armstrong Gallaway and others, bounded as follows, to wit:

Being the land known as the "Lacy Place," deeded to Robert Lewis by A. H. Gallaway, as appears of record at the register's office, Wentworth, N. C., Book 94 of Deeds, page 123, and containing (400) four hundred acres.

It is the object and intent of this deed to *secure* to said Annie L. Burton and Katie L. Cahill the above lands during their lifetime, afterward to their children.

To have and to hold the aforesaid tract or parcel of land and all privileges and appurtenances thereto belonging to the said Annie L. Burton and Katie L. Cahill for life, and afterwards their children's only use and behoof forever."

The following judgment was rendered: "This cause coming on to be heard and being heard before his Honor, James L. Webb and a jury, at the June Term, 1926, of the Superior Court of Rockingham County, and at the close of the evidence it was agreed that the matters in controversy were questions of law for the court, and that the court being of the opinion that the plaintiff, Annie L. Burton, and the defendant, Katie Lewis Cahill, hold the lands described in the pleadings as joint tenants with the right of survivorship, and that the lands are not subject to partition during the lifetime of either of them, and that the children of the plaintiff, Annie Lewis Burton, and of the defendant, Katie Lewis Cahill, take the lands after the death of the joint tenants *per stirpes,* and not *per capita.*

It is, therefore, considered, ordered and adjudged:

1. That Annie Lewis Burton and Katie Lewis Cahill hold the lands described in the pleadings as joint tenants with the right of survivorship, and that said lands are not subject to partition during their joint lives or the lifetime of the survivor.

2. Upon the death of Katie Lewis Cahill and of Annie Lewis Burton, the children of the said Katie Lewis Cahill will take and hold a one-half undivided interest in said land and the children of Annie Lewis Burton will take and hold a one-half undivided interest in the said lands.

It is further considered, ordered and adjudged that the cost of this action be taxed by the clerk, one-half against the plaintiff, and one-half against the defendants."

From the foregoing judgment both parties appealed.

J. G. Brown, and Manly, Hendren & Womble for plaintiffs.

McMichael & McMichael, and Swink, Clement, Hutchins & Feimster for defendants.

BROGDEN, J. Two propositions of law are presented by the record:

1. Do the life tenants under said deed, to wit, Annie L. Burton and Katie L. Cahill, take said land as joint tenants, for life, with right of survivorship, or as tenants in common?

2. Do the children of said life tenants take *per capita* or *per stirpes?*

The plaintiffs assert that the life tenants take as tenants in common, and that, at the death of the life tenants, the children of the life tenants would take *per stirpes.*

The defendants, upon the other hand, assert that the life tenants take as joint tenants and that, upon the death of the life tenants, the children would take per capita.

The pertinent portions of the deed of Robert Lewis to the life tenants, Annie L. Burton and Katie L. Cahill, are as follows: "That the first party in consideration of natural love . . . and a wish to provide for said daughters . . . do convey to said Annie L. Burton and Katie L. Cahill and their children . . . a tract of land, . . . containing four hundred acres. It is the object and intent of this deed to secure to said Annie L. Burton and Katie L. Cahill the above land during their lifetime, afterward to their children. To have and to hold the aforesaid tract or parcel of land and all privileges and appurtenances thereto belonging to the said Annie L. Burton and Katie L. Cahill for life and afterwards their children's only use and behoof forever."

"The estate of joint tenancy is purely conventional, *i. e.*, created by act of the parties—and never arises by operation of law." 2 Black., *180; Mordecai's Law Lectures, vol. 1, 60.

The distinguishing characteristics of the estate are the four unities of interest, title, time, and possession; that is to say, joint tenancy is one and the same interest, flowing from one and the same conveyance,

beginning at one and the same time and held by one and the same undivided possession. 2 Blck., 180; Tiffany Real Property, vol. 1, sec. 191. The predominant incident of joint tenancy at common law was survivorship. This incident of survivorship resulted from the theory that joint tenants together own but one estate, and upon the death of either the title vested in the survivor. Survivorship in joint tenancies was recognized in North Carolina until 1784, when survivorship was abolished. C. S., 1735. After the enactment of C. S., 1735, it was urged that joint tenancies were abolished in North Carolina by reason of the fact that survivorship had been destroyed. This contention was made in the case of *Rowland v. Rowland,* 93 N. C., 214. *Ashe, J.,* says: "The first point presented for our consideration, is the proposition contended for by the plaintiff's counsel, 'that the act of 1784 abolished the *jus accrescendi* in joint estates, and that there is no such thing recognized by our law as survivorship.' But this is a mistake. Joint tenancies were not abolished by the act of 1784" (now C. S., 1735). C. S., 1735, abolished the right of survivorship, only in joint tenancies in fee, but does not affect joint estates for life or estates by entirety. *Vass v. Freeman,* 56 N. C., 221; *Powell v. Allen,* 75 N. C., 450; *Blair v. Osborne,* 84 N. C., 417; *Powell v. Morrisey,* 84 N. C., 421.

In *Powell v. Allen,* 75 N. C., 452, *Pearson, C. J.,* says: "When two or more acquire land by purchase, as distinguished from descent, and the four unities exist, to wit, 'time, title, estate and possession,' they take as joint tenants unless there be an express provision that they shall take as tenants in common, and not as joint tenants." In construing the act of 1784, now C. S., 1735, *Chief Justice Pearson* says, further: "It is obvious that these words cannot be made to apply to joint tenants for life."

The *Powell case* arose upon a partition proceeding instituted in Wake County. The will from which the title of the litigants was derived devised the property to the daughter of the testator during her lifetime and at her death to three grandsons, naming them, "for them to use during their natural lives, for it not to be subject to be parted with under no consideration; at their death I give all the above property to their children."

In *Powell v. Morrisey,* 84 N. C., 421, which was also a partition proceeding, the deed, after reserving a life estate to the grantor, conveyed the property to five grandsons, naming them. *Ruffin, J.,* says: "A copy of the deed is made a part of the case, and upon reference to it we find that after reserving the land to the grantor for his life, it conveys vested remainder to the five grandsons, without the addition of "any restrictive, exclusive, or explanatory words," such as is said by Blackstone, in his Commentaries, to be necessary to prevent the estate created

by it becoming a joint tenancy. It has every element essential to constitute it an estate of that character as defined both by the author just quoted and *Lord Coke,* and must be so construed by us, and all the properties and incidents be given it, that properly belonged to such an estate at common law save as they may have been modified by statute."

So that, in North Carolina, in a conveyance in which the four unities concur, the law favors joint tenancy, or, in other words, the common-law rule prevails in the absence of restrictive, exclusive or explanatory words manifesting an intention to create a tenancy in common. The language of the deed is not ambiguous, and an examination of the entire instrument does not disclose either explanatory or restrictive words necessary to take the conveyance out of the general rule; neither is any language used which manifests an intention on the part of the grantor to create a tenancy in common.

By virtue of the decisions applicable, we are compelled to hold that the deed created a joint tenancy for life in Annie L. Burton and Katie L. Cahill.

The second proposition of law to be considered is whether or not the children take *per capita* or *per stirpes.* The general rule is thus declared by *Walker, J.,* in *Mitchell v. Parks,* 180 N. C., 634: "It is generally held that a devise or bequest to the children of two or more persons, whether expressed as to the children of A. and B., or to the children of A. and the children of B., or to other relatives of different persons, usually means that such children or relatives shall take *per capita* and not *per stirpes,* unless it is apparent from the will that the testator intended them to take *per stirpes.* But a devise or bequest to the heirs of several persons will usually go *per stirpes.*"

In the case of *Leggett v. Simpson,* 176 N. C., 3, the devise was to "my nieces, Elizabeth Bateman, wife of John Daniel Bateman, and to Charlotte Baxter, wife of Samuel Baxter, . . . for and during the terms of their natural lives. I give and devise to the lawful children of my nieces, Elizabeth Bateman and Charlotte Bateman, all the lands which I have loaned . . . to my nieces, . . . to have and to hold to them in fee simple forever, at the death of my aforesaid nieces." *Clark, C. J.,* says: "There is nothing in the will which impairs the usual rule of construction that where a devise is to a class collectively, and not by name to various devisees in the class, all the members of the class take *per capita* and not *per stirpes.*"

What, then, are the *indicia* of per capita division?

1. When the words "equally divided" or "share and share alike" are used. *Hastings v. Earp,* 62 N. C., 5.

2. When the legatees are named in the will. *Culp v. Lee,* 109 N. C., 675.

3. "Whenever, as a class, the beneficiaries are individually named or designated by the relationship to some ancestor living at the date of the will, whether to the testator or to some one else, they share *per capita* by natural inference and not *per stirpes.*" *Shull v. Johnson,* 55 N. C., 202; *Ex parte Brogden,* 180 N. C., 157.

4. The general rule is that the distribution is per capita unless the entire will discloses a contrary intent. *Bryant v. Scott,* 21 N. C., 155; *Britton v. Miller,* 63 N. C., 268; *Howell v. Tyler,* 91 N. C., 213; *Ex parte Brogden,* 180 N. C., 157.

5. The degree of consanguinity to the testator may be considered where the intent of the testator is doubtful. *Kirkpatrick v. Rogers,* 41 N. C., 130; *Ex parte Brogden,* 180 N. C., 157.

The same rule that prevails in the construction of wills, regulating or prescribing *per capita* or *per stirpes* distribution, applies to conveyances. *Cullens v. Cullens,* 161 N. C., 344; *McCallum v. McCallum,* 167 N. C., 310; *Leggett v. Simpson,* 176 N. C., 3.

By the express terms of said deed the remainder, upon the death of the life tenants, is given to the children of the life tenants. These children are designated as a class, and, therefore, under the rules of law governing such distributions, they take *per capita* and not *per stirpes.*

C. S., 3215, provides for partition among persons claiming real estate as joint tenants or tenants in common. This statute was construed by *Chief Justice Clark,* in *Ray v. Poole,* 187 N. C., 749, in the last opinion written by him and filed after his death. After referring to C. S., 3215, the opinion declares: "But it is no authority for partition as between the life tenant and remaindermen, except where the proceeding is brought by the remaindermen and the life tenant is joined. Nor does C. S., 1745, authorize or validate a partition sale at the instance of a life tenant against vested remaindermen, who are not infrequently children."

Therefore, under the principle announced in this decision, the present partition suit would not lie.

Reversed.

M. V. BUTLER v. ARMOUR & COMPANY AND ARMOUR FERTILIZER WORKS.

(Filed 10 November, 1926.)

1. Removal of Causes—Diverse Citizenship—Waiver.

Under the Federal statute the State and the Federal courts have concurrent jurisdiction over causes removable from the State to the Federal Court, coming within its provisions between a citizen of this State and a

nonresident defendant corporation of another state, with the right of the defendant to remove the cause from the State to the Federal Court upon the filing of a proper petition and bond, according to the requirements of the Federal statute, unless this right has in some recognized way been waived by it.

2. Same—Corporations.

A corporation of another state, existing under its laws with the right of conducting its business in this jurisdiction, for the purpose of exercising the right in proper instances may remove a cause against it from the State to the Federal Court, under the Federal statute.

3. Removal of Causes—Courts—Jurisdiction—Pleadings—Waiver—Judgments—Estoppel.

Where by consent of a nonresident defendant, a cause is retained in the State court, and the judge thereunder has granted the nonresident defendant, within its discretion, time to answer the complaint beyond that which the State statute allows, 3 C. S., 509, the nonresident waives his right to remove and is thereafter estopped from asserting it by filing a proper petition and bond in conformity with the Federal removal act, relating to diverse citizenship.

4. Federal Courts—Federal Questions—United States Supreme Court—Conflict of Opinions.

Where the decisions of the Federal courts inferior to the Supreme Court of the United States are in conflict as to matters involving Federal questions, in this case jurisdiction of the Federal courts in relation to the questions of the removal of causes from the State to the Federal Court for diverse citizenship, and the United States Supreme Court has not passed upon the matter, the decisions of the State court will prevail.

APPEAL from *Barnhill, J.*, at July Term, 1926, of Superior Court of NEW HANOVER. Affirmed.

The necessary facts will be stated in the opinion.

A. G. Ricaud, L. Clayton Grant and Bryan & Campbell for plaintiff.
John D. Bellamy & Sons for Armour Fertilizer Works.

CLARKSON, J. This is an action by the plaintiff for actionable negligence against the defendant Armour Fertilizer Works, a corporation under the laws of New Jersey, for personal injuries alleged to have been sustained. The defendant, after due notice, giving required bond, etc., filed a petition for the removal of the action from the State court to the United States Court for the Eastern District of North Carolina, on the ground of diversity of citizenship, the amount sued for being $19,700. The action was brought originally against Armour & Company, and it filed answer denying right of plaintiff to recover. When

the case was called for trial, the following judgment was rendered at May Term, 1926, by the court below:

"This action having been called for trial, and it appearing to the court that Armour Fertilizer Works is a proper and necessary party and Armour Fertilizer Works, through its attorney and its process officer for service in this State having appeared and made itself a party to this action:

It is now, on motion of counsel for the plaintiff, adjudged that Armour Fertilizer Works be, and it is hereby made a party defendant to this cause, and it comes in and submits itself to the jurisdiction of this court, and the plaintiff shall have fifteen days within which to file amended complaint, and the defendants to have thirty days thereafter to file answer or other pleadings and this cause is continued. G. E. Midyette, judge presiding. Consented to," and signed by attorneys for plaintiff and defendant.

The amended complaint against Armour Fertilizer Works was filed 16 June, 1926, and the notice, petition, bond and motion for removal was filed within twenty days, on 16 July, 1926. The petition by Armour Fertilizer Works for removal was first heard before the clerk of the court, who denied the motion, and it appealed to the Superior Court, which affirmed the clerk's decision.

The first paragraph of section 24 of the Judicial Code enumerates the classes of controversies which most frequently arise and in which there is concurrent jurisdiction: "All suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same State claiming lands under grants from different states; *or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars,* and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) *is between citizens of different states,* or (c) is between citizens of a state and foreign states, citizens or subjects."

The jurisdiction given to the District Court by section 24 of the Judicial Code is for the greater part not exclusive, but is concurrent with the courts of the states; that is to say, the plaintiff has the option of bringing his suit either in a state or a Federal court.

"Amount in controversy. Must be not less than $3,000 exclusive of interest and costs." *Davis v. Wallace,* 257 U. S., 478, 482. "In suits to recover unliquidated damages, the amount in controversy is the amount sued for in the petition or bill." *Fernandina Shipbuilding and Dry Dock Co. v. Peters,* 283 Fed., 621.

"Corporations, for the purposes of Federal jurisdiction, are citizens of the State under whose laws they are incorporated. *(Thomas v.*

Board of Trustees, etc., 195 U. S., 207.) And corporations organized under the laws of one state and qualifying to do business in another, are still for jurisdictional purposes, citizens of the former." *Southern R. R. Co. v. Allison*, 190 U. S., 326; *Van Dyke v. Insurance Co.*, *ante*, p. 206.

"Procedure for removal. Whenever any party entitled to remove any suit mentioned in the last preceding section, except suits removable on the ground of prejudice or local influence, may desire to remove such suit from a state court to the District Court of the United States, *he may make and file a petition, duly verified, in such suit in such state court at the time, or any time before the defendant is required by the laws of the State or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff*, for the removal of such suit into the district court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such district court, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and for paying all costs that may be awarded by the said district court if said district court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the state court to accept said petition and bond and proceed no further in such suit. Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same. The said copy being entered within said thirty days as aforesaid in said District Court of the United States, the parties so removing the said cause shall, within thirty days thereafter, plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said district court. (36 Stat. L., 1095)." Babbitt Judicial Code and Equity Rules, sec. 29, p. 44.

"The right to remove a case cannot be given by consent. A case may be removed only when the Federal statute so provides. It can never be removed merely because both parties are willing that it shall be.

"The right to remove may be waived. On the other hand, as it is a mere right of the parties, and under the present statute, a right confined to the defendant, he can exercise it or not as he sees fit. He may so act as to show that he has elected not to do so. This election he will conclusively evidence by not making his motion to remove within the time limited by law. It is easy to conceive of many other ways in which even before the expiration of the time in which, if at all, he must exercise this right, he may so act as to estop himself from so doing, upon

the theory that what he has done shows that he has agreed not to avail himself of it." Rose's Federal Jurisdiction and Procedure, 3 ed. (1926), secs. 408 and 409.

"The lower Federal courts are in irreconcilable conflict as to whether an extension of time to plead, either by order of the court, or by agreement of the parties, correspondingly extends the time in which the defendant may ask for removal, and the Supreme Court has not yet had occasion to settle the controversy." Rose, *supra*, part sec. 445, p. 402. Mr. Rose, in his valuable work gives the Federal decisions in different circuit and district courts.

Judgment of Barnhill, J.: "At Superior Court, held at the courthouse in Wilmington, on 29 July, A. D. 1926. Present: Hon. M. V. Barnhill, judge.

"This action having been called for hearing upon a motion made by the defendant for the removal of this cause to the United States District Court at Wilmington, N. C., for trial, and being heard upon papers filed in this cause, and it appearing to the court that the amended complaint of plaintiff was filed on 16 June, 1926, and the petition, bond and motion for removal all in writing was filed with the clerk of this court on 6 July, 1926, and it further appearing to the court that the petition and bond for removal are in proper form and sufficient in substance, and that the clerk of the court denied defendant's motion for removal, and defendant appealed to this court, as appears by the order of the clerk, and this motion is by consent, heard by the undersigned at this time, and the court being of the opinion that the recital in the order of Judge Midyette, reciting that the defendant 'submitted itself to the jurisdiction of this court' would not by reason of such recital prevent the defendant from removing the cause, but the court being of the opinion that the other provisions of said order and other facts appearing from the record, are such as to bar the right of the defendant to remove this cause: It is therefore ordered and decreed by the court that the defendants' motion for removal be, and the same is denied, and order of clerk is affirmed, and this cause is retained in this court for trial upon its merits."

The defendant, Armour Fertilizer Works, a corporation under the laws of New Jersey, had the right, privilege and option (the statute says "may") of contesting the suit of plaintiff either in the State court or by removal to the United States District Court. The sole question presented in this action, from the record, is, did defendant waive this right, privilege or option and elect to litigate in the state court?

Vol. 3, C. S., 509, is as follows: "The defendant must appear and demur or answer within twenty days after the return day of the sum-

mons, or after service of the complaint upon each of the defendants or within twenty days after the final determination of a motion to remove as a matter of right. If the time is extended for filing complaint, then the defendant shall have twenty days after the final day fixed for such extension in which to file the answer or demurrer, or after service of the complaint upon each of the defendants (in which latter case the clerk shall not extend the time for filing answer beyond twenty days after such service): *Provided,* in cases where the complaint is not served, for good cause shown, the clerk may extend the time to a day certain; otherwise the plaintiff may have judgment by default."

In the present action, when the case came on for trial, the Armour Fertilizer Works, Inc., was made a party defendant. The court below, in its discretion, gave the plaintiff fifteen days within which to file amended complaint, defendant to have thirty days thereafter to file answer and other pleadings. This judgment was consented to and signed by attorneys for plaintiff and defendant. This judgment extended the time for defendant to plead beyond the time allowed by the statute quoted, *supra.* This extension of time was in the discretion of the court below. C. S., 536; *McNair v. Yarboro,* 186 N. C., 111; *Howard v. Hinson,* 191 N. C., 368; *Greenville v. Munford, ibid.,* 373; *Burton v. Smith, ibid.,* 603.

Whatever may be the decision in other courts, this matter has been settled in this jurisdiction contrary to the contention of defendant. We can find no decision of the Supreme Court of the United States which would change the decisions of this State. In *Pruitt v. Power Co.,* 165 N. C., 418, *Clark, C. J.,* said: "The entering into the stipulation for an extension of time to file the answer, which was duly approved by the judge, was a general appearance in the State court and waived the right to remove. It was an acceptance of the jurisdiction of the State court. *Howard v. R. R.,* 122 N. C., 944; *Duffy v. R. R.,* 144 N. C., 23." This principle has been approved in numerous opinions of this Court, among them: *Dills v. Fiber Co.,* 175 N. C., 49; *Patterson v. Lumber Co.,* 175 N. C., 92; *Powell v. Assurance Society,* 187 N. C., 596, and *Burton v. Smith, supra,* p. 603.

Under the facts and circumstances of this case, we are of the opinion that defendant, Armour Fertilizer Works, Inc., by agreeing that the court below exercise its discretion and give defendant 30 days (10 days beyond the time allowed by the statute) to file answer or pleadings after the plaintiff filed his amended complaint, waived the right, privilege or option it had to remove its case to the U. S. District Court, and it was a general appearance and an election to try the case in the State court. Defendant, Armour Fertilizer Works, Inc., consented to this time and

thus submitted itself to the jurisdiction of the State court, receiving a discretionary favor or grace that it was not in law entitled to, and it is thereby estopped by its conduct and it has waived its right, privilege or option to remove the action against it from the State court to the U. S. District Court.

For the reasons given, the judgment of the court below is

Affirmed.

J. H. TATE, ON BEHALF OF HIMSELF AND OTHER TAXPAYERS OF McDOWELL COUNTY, v. THE BOARD OF EDUCATION OF McDOWELL COUNTY AND THE BOARD OF COMMISSIONERS OF McDOWELL COUNTY.

(Filed 10 November, 1926.)

1. **Schools—Constitutional Law—Statutes.**

The Legislature alone is given by our Constitution the power to provide by taxation and otherwise for a general and uniform system of public schools. Const. of N. C., Art. VII, sec. 7.

2. **Same—Municipal Corporations—Cities and Towns.**

Where upon petition by the school board the board of county commissioners have approved the former finding as to the necessity of additional school houses as necessary to provide for a six months term therein for public schools in certain of its districts, it is within the province of the Legislature to provide for the school buildings, and an issuance of bonds for this purpose, without statutory authority, is invalid. Const. of N. C., Art. IX, sec. 3; Art. VII, sec. 7.

3. **Same—Government—School Commissioners—Principal and Agent.**

As a ministerial agent of the State, the duty of the county board of education is to maintain the six months terms of public schools required by Art. VI, sec. 7, and determine the necessity therefor, though the power of taxation to erect buildings for this purpose is within the duty of the Legislature by enacting appropriate statutes.

4. **Same—Demurrer.**

Where the complaint fails to show that the county commissioners, acting upon the recommendation of the school board, were with statutory power to issue bonds for the erection of additional school buildings to carry on six months terms in certain school districts; but to the contrary, a demurrer to the complaint is good.

APPEAL by defendants from judgment of *McElroy, J.*, at Chambers, dated 15 April, 1926. From McDOWELL. Affirmed.

Action by plaintiff on behalf of himself and other taxpayers of McDowell County, to enjoin defendants, the board of education and the board of commissioners of said county, from issuing or selling bonds of said county, or from otherwise creating or attempting to create lia-

bilities against said county or its taxpayers, for the purpose of erecting schoolhouses in certain school districts in said county, pursuant to resolutions adopted by said boards, upon the allegation that said boards were without authority to adopt said resolutions and to issue or sell said bonds, or to create or attempt to create said liabilities, by virtue of said resolutions.

From judgment overruling defendants' demurrer to the complaint, and thereupon enjoining defendants in accordance with the prayer of the complaint, defendants appealed to the Supreme Court.

Morgan & Ragland for plaintiff.

Hudgins, Watson & Washburn, Pless, Winborne & Pless, Attorney-General Brummitt and Assistant Attorney-General Nash for defendants.

CONNOR, J. Prior to the commencement of this action, the board of education of McDowell County, at a regular meeting, duly adopted a resolution, relative to the needs of certain school districts in said county, with respect to schoolhouses required for the maintenance in each of said districts of a six-months school in compliance with the provisions of section 3 of Article IX of the Constitution of North Carolina. The said board caused a copy of said resolution to be certified to the board of commissioners of McDowell County. The said resolution is embodied in a resolution thereafter adopted by the said board of commissioners, a copy of which is attached to and forms a part of the complaint in this action.

In its resolution, the board of commissioners recites that it has been requested by the board of education of the county to provide funds for the erection in each of four school districts in McDowell County, of a schoolhouse in which a public school for said district shall be taught for a term of six months in every year; that said board of education has found and determined, as appears by its resolution certified to the board of commissioners, that in neither of said school districts is there a schoolhouse adequate or sufficient for the maintenance in said school district of such school; that neither the said board of education nor the said districts have funds, or means of raising funds to defray the expense of erecting schoolhouses in said districts necessary or adequate for the maintenance therein of a public school as required by the Constitution of North Carolina; that the total sum required for the erection in said school districts of schoolhouses necessary or adequate for the maintenance of such schools is $270,000.

The board of commissioners thereupon finds and determines "that the present facilities and buildings in those school districts in McDowell County, North Carolina, known as Cross Mill District, Montford Cove

Consolidated School District, Old Fort School District, and Clinchfield School District, are inadequate and insufficient for maintaining a six-months school term, and that the amounts specified in the foregoing resolution of the board of education of McDowell County required for the buildings necessary for maintaining a six-months term of school in the respective districts, is fair and reasonable."

The said board of commissioners further finds and determines "that the building for maintaining a six-months term of school in the several districts of McDowell County, North Carolina, and in those districts hereinbefore named is a public necessity which the county is required to provide under the provisions of the Constitution of North Carolina."

It is thereupon resolved by the said board of commissioners of McDowell County:

"SECTION 3. That the county board of education of McDowell County, North Carolina, be, and it is hereby authorized and empowered to proceed to provide the necessary buildings in the Cross Mill District, in the Montford Cove Consolidated School District, in the Old Fort District, and in the Clinchfield School District, for maintaining a six-months school term in accord with this resolution, within the limits of the amounts specified herein in the respective districts.

SEC. 5. The bonds in the aggregate amount of $270,000 shall be issued, and the issuance thereof is hereby ordered under and by virtue of the power given to the county board of commissioners under and by virtue of the power and direction granted under the Constitution of North Carolina, for the purpose of providing the necessary and adequate buildings for maintaining of a six-months term in the several districts of McDowell County, North Carolina, especially in those several districts as follows: In Cross Mill School District, in Montford Cove District, in Old Fort School District and in Clinchfield School District, in McDowell County, North Carolina.

SEC. 6. That the said bonds shall be issued and executed in the name of McDowell County, and shall be signed by the chairman of the board of county commissioners, with the corporate seal of the said county affixed and attested by the clerk of the board of county commissioners, and the coupons shall be attached to the said bonds and shall bear the printed or lithographed *fac simile* of the signatures of the said chairman and the said clerk.

SEC. 9. That a tax sufficient to pay the interest on said bonds as same matures and to create a sinking fund with which to pay the principal of said bonds at maturity as same matures, shall be annually levied and collected."

It will be noted by reference to the resolution of the board of commissioners, set out in the complaint, that neither the board of commis-

sioners nor the board of education, recite therein any statutory authority for the issuance or sale of said bonds, or for the incurring of said indebtedness on behalf of McDowell County, for the erection of schoolhouses in the school districts of said county, found by both boards to be necessary for the maintenance of public schools in said districts for the term required by the Constitution. The board of commissioners, in authorizing the board of education to cause said schoolhouses to be erected, and in ordering the issuance of said bonds, and directing the levying of a tax for the payment of interest and principal to be due thereon, purport to act solely under and by virtue of provisions of the Constitution of North Carolina. The allegation in the complaint that the board of commissioners is without authority, by virtue of any statute enacted by the General Assembly of North Carolina, to authorize the erection of said schoolhouse, the issuance and sale of said bonds, or the levying of said tax as provided in its resolution, is admitted by defendants in their demurrer.

It is the contention of defendants that the board of commissioners of McDowell County has authority under the Constitution of North Carolina to provide funds, by the issuance of bonds of the county, or otherwise, for the erection of schoolhouses in the several school districts of their county, required for the maintenance of schools therein for six months in every year, upon their finding that such schoolhouses are necessary for that purpose, and that no statute, enacted by the General Assembly of the State authorizing the issuance of said bonds or the levying of said tax is required. The absence of such statute applicable to McDowell County is conceded. This contention involves the only question presented by the pleadings in this case. Judge McElroy, having heard the cause, upon defendants' demurrer, pursuant to a stipulation signed by attorneys for both plaintiff and defendants, was of the opinion that defendants are without power under the Constitution of North Carolina to create the indebtedness provided for in the resolution, and that the board of commissioners of McDowell County is without authority of law to issue said bonds or to levy said tax, as provided in the resolution, for that it was not authorized so to do by any statute of the General Assembly; pursuant to this opinion, it was considered, ordered and adjudged that the demurrer be and the same was overruled. It was further considered, ordered and adjudged that defendants be and they were enjoined, in accordance with the prayer of the complaint.

The only assignment of error upon the appeal to this Court is based upon an exception to the signing of the judgment, and, therefore, presents for our decision the sole question as to whether the erection of schoolhouses in the several school districts of the various counties of

the State, required for the maintenance in each of said districts of a school for a term of six months in every year, is primarily the duty of the county or of the State. Conceding that the erection of such schoolhouses is a necessary public expense, is it the duty, under the Constitution of North Carolina of the boards of commissioners of the several counties, or of the General Assembly, to provide by taxation and otherwise for funds required for the erection of such schoolhouses? It would seem that the power to act in the premises should be commensurate with the duty imposed. If under the Constitution it is the duty of the county to provide funds for a necessary public expense, the contention that the board of commissioners of the county has the power conferred by the Constitution to provide such funds, without further authority from the General Assembly, would seem to be entitled to serious consideration, at least.

The proposition is well established by authoritative decisions of this Court, that the erection of schoolhouses in the several school districts in each county of the State, required for the maintenance, in each of said districts, for a term of six months in every year, of one or more schools, wherein all children of the State, between the ages of six and twenty-one, residing in said district, or entitled under the law to attend schools therein, may have tuition free of charge as required by the Constitution of the State, is a necessary public expense. It has been held that the erection of school buildings is not a necessary municipal expense—that is, an expense which a county, city or town may incur, as a municipal corporation, without the approval of a majority of the qualified voters of said county, city or town. Const. of N. C., Art. VII, sec. 7. It is, however, fully within the power of the General Assembly, because of the duty imposed upon it by the Constitution to "provide by taxation and otherwise for a general and uniform system of public schools," to authorize and direct the respective counties of the State, as administrative units of the public school system, or as governmental agencies employed for that purpose by the General Assembly, to provide the money for such expense, by taxation or otherwise. *Lovelace v. Pratt*, 187 N. C., 686; *Lacy v. Bank*, 183 N. C., 373. The General Assembly may also provide funds for the erection of schoolhouses, required for the maintenance for a term of six months in every year of public schools, in the several school districts, into which the counties are divided, in accordance with the express mandate of the Constitution, by issuing and selling the bonds of the State, and directing that the proceeds of the sale of said bonds shall be loaned to the several counties of the State, upon terms prescribed by the General Assembly. Statutes enacted by the General Assembly, in the exercise of this power, have been held valid, *Lacy v. Bank, supra.*

It was said by this Court, in the opinion written by *Hoke, J.*, in *Lacy v. Bank*, that a proper consideration of Article IX of the Constitution clearly discloses, "that its provisions are mandatory, imposing on the Legislature the duty of providing by taxation and otherwise for a general and uniform system of public education, free of charge to all the children of the State from six to twenty-one years, that the school term in the various districts shall continue for at least six months in each and every year, and that the counties are recognized and designated as the governmental agencies through which the Legislature may act in the performance of their duty and in making its measures effective. In various decisions of the Court the importance and imperative nature of these constitutional provisions have been upheld and emphasized. *Board of Education v. Board of Comrs.*, 178 N. C., 305; *Board of Education v. Board of Comrs.*, 174 N. C., 469; *Collie v. Comrs.*, 145 N. C., 170."

No duty is imposed by the Constitution upon the boards of commissioners of the several counties of the State, to provide funds by taxation or otherwise for the maintenance of public schools in the districts of their counties; this duty is imposed by express language upon the General Assembly. It was clearly the purpose of the people of North Carolina when they adopted the Constitution of the State, containing Article IX, entitled "Education," that a general and uniform system of public schools should be established, to the end that all the children of the State, between the ages of six and twenty-one years, should have tuition therein, free of charge. It was made the duty of the General Assembly to provide for such a system by taxation or otherwise. The only duty imposed by the Constitution upon boards of commissioners of the several counties, with respect to this State-wide system of public schools, is to maintain a school in such district of their county for a term not less than six months in every year; to enable the board of commissioners of each county to perform this duty, it is the duty of the General Assembly to provide the money required, by taxation and otherwise. With respect to funds for said purpose, the board of commissioners has neither any duty nor any power, under the Constitution. The counties of the State, organized primarily for purposes of local government, are recognized in the Constitution as administrative units of the State-wide system of public schools, and may be used, as they have been, by the General Assembly, as agencies of the State in the performance of its duty to provide for such system. The demurrer was properly overruled, and upon the facts alleged in the complaint and admitted by the demurrer, the judgment enjoining defendants is

Affirmed.

M. A. INGE v. SEABOARD AIR LINE RAILWAY CO.

(Filed 17 November, 1926.)

1. **Master and Servant—Employer and Employee — Statutes — Federal Employers' Liability Act—Courts—Jurisdiction.**

The jurisdiction of the State and Federal courts for a personal injury to a railroad employee is concurrent under the Federal Employers' Liability Act, and an action brought in the State court is not removable by the defendant nonresident.

2. **Same—Evidence—Procedure.**

Where an action is brought in the State court coming under the provisions of the Federal Employers' Liability Act, the Federal decisions are controlling, but the rules of practice and procedure are governed by the laws of the State court.

3. **Same—Common Law.**

The common-law rule denying recovery of a servant injured by the negligent act of a fellow-servant has no application under the Federal Employers' Liability Act.

4. **Same—Contributory Negligence—Comparative Negligence—Damages—Statutes—Fellow-Servants.**

The rule that bars the injured employee from recovering in an action against his employer when the employee is guilty of contributory negligence, does not apply to cases coming under the provisions of the Federal Employers' Liability Act, and when contributory negligence is legally established, it only diminishes the damages, and no contributory negligence may be shown when the employer's act is in violation of a law enacted for the employee's protection.

5. **Same—Nonsuit.**

A judgment as of nonsuit upon the evidence may not be granted under our statute when there is legal evidence of the employee's negligence in an action under the Federal Employers' Liability Act, upon the sole ground of the plaintiff's contributory negligence. C. S., 567.

6. **Evidence—Motions—Nonsuit—Statutes.**

On a motion to nonsuit, the evidence is to be taken in the light most favorable to the plaintiff, and the benefit given him of any reasonable intendment, and any inference to be drawn therefrom.

7. **Employer and Employee—Master and Servant—Federal Employers' Liability Act—Evidence—Nonsuit.**

Where the conductor in charge of a yard switch engine of a railroad company has at night left the engine with box-car attached on the track in charge of the fireman and engineer, with instructions not to move the train, while in pursuance of his employment he went to defendant's outgoing train to get information as to track clearance, and got on the step of the engine, and as he stepped off between and on the parallel track at a public crossing, was run upon and injured by the backing train he had left on a parallel track some distance away, approaching without warning of any kind: *Held*, under conflicting evidence, sufficient upon

the issue of the defendant's actionable negligence and the proximate cause of the injury to take the case to the jury, in an action brought under the Federal Employers' Liability Act.

8. Same—Contributory Negligence.

Under the facts of this case: *Held*, the failure of the conductor to look back for his shifting train was not the sole proximate cause of the injury he received, there being no circumstance to show that he could have anticipated that the employees thereon would disobey his orders not to move the train he had left, or that by so doing he would have discovered the danger, he having relied on the crew of the switch train to obey his orders.

9. Same.

Where the conductor of a shifting train on a local yard has been injured by the negligent moving of the train contrary to his instructions, which proximately caused the injury in suit, a judgment as of nonsuit upon that issue is properly denied.

10. Same—Damages—Conflict of Laws.

Under the provisions of the Federal Employers' Liability Act, a railroad company is liable in damages for a personal injury negligently inflicted by it on its employee, such sum as would presently represent, without interest added, the sum total of the diminished power in the future, the difference between what he can now earn and what he would have been able to earn in the future had the physical injury not been inflicted on him, using the mortuary table given by statute, as evidence of his expectancy of life at his age, with other competent evidence as to his physical condition and ability to earn, together with the other elements of physical pain and mental suffering caused by the injury in suit. The difference between the State and Federal statutes distinguished by *Clarkson, J.*

APPEAL by defendant from *Cranmer, J.*, and a jury, at March Term, 1926, of HALIFAX. No error.

Civil action for actionable negligence under Federal Employers' Liability Act.

Plaintiff was an employee of defendant as yard conductor at Weldon, and defendant is a common carrier by railroad, engaged in interstate commerce.

The defendant denied any negligence, and set up (1) contributory negligence; (2) assumption of risk.

The material facts, as testified to by plaintiff, on direct-examination, in substance: That he left the engineer and switchman in charge of the switch engine with headlight out and one box-car coupled to it, standing still on pass track, and told the switchman to stay there until No. 85, the through freight, pulled out of the yard. No. 85 and the switch engine and box-car were on parallel tracks. It was 325 feet from where the engine and box-car were left standing to Poplar Street public crossing in Weldon, where plaintiff was injured. As No. 85 pulled on

down, plaintiff got up on the steps of the engine, just back of his switch train, and asked the engineer what orders he had for No. 82, the through train going north. This was done so that he could govern his movements in switching in the yard, so that No. 82 might not be delayed at the Weldon yard. This was in performance of his regular duty. He was standing on the engine step of No. 85, holding to grab-irons with lighted lantern in his left hand, talking to the engineer, and just as he got to Poplar Street crossing he stepped off the engine. The engineer of No. 85 hollered, "Look out!" and he glanced over his shoulder and saw the box-car of the switch train. He tried to save himself but was knocked face down and his leg mashed so that it had to be amputated. He heard no signal given by the switch engine approaching the crossing—no bell or whistle. The first knowledge he had that the switch engine crew had disobeyed orders was when the engineer of No. 85 hollered at him to "Look out." At the time the train hit him, no one from the switch engine gave him any warning. He had not heard it and when he glanced back he did not see any light on the end of the car or anybody there. He was hit by the box-car of the backing train on the pass track. There was nothing to prevent the switch engineer, if he was looking, from seeing him step down off of engine No. 85 when he reached Poplar Street crossing.

On cross-examination: "If I had looked back I would not have gotten off in front of it. If I had looked back and saw the train, of course I would not have been hurt. This is the evidence that I did not look back (exhibiting his injured leg) as I said before. I had told the train to stand still and I had no reason to look back. I was not expecting the train to move. I stepped off the moving engine and was looking in the direction in which the engine was moving. I could have seen this other train coming if I had looked. I don't know whether I could have seen it in time to have gotten out of the way. If I had looked back and seen the train coming, and if I had stayed where I was, I would not have been hurt. If I had looked back and seen this train I certainly would have stayed where I was. I had no occasion to look back though, because I relied upon my orders being obeyed. I had given orders for that train to remain where it was and I relied upon it standing still. . . . During the time I did not look back. It took some little time to step down between the tracks and to step across to the next track. I never looked back. When I was getting ready to step down off the engine, and when I was between the tracks, and when I started across the next track, I did not look back. My leg shows that I did not look back. I was not trying to get hurt. I had no occasion to be looking for a train. There was no other train on the yard at that time except the one I was riding on and my yard train. I had left my engine and car down the

track and had given orders for my train to stand still until No. 55 had pulled through and I was not expecting any. I was not paying any attention to my train, because I had already given attention to it. If my train had remained where I ordered it to remain, I would not have been hurt. . . . I am thoroughly familiar with the Weldon yard. I had worked there about two years before this time. I knew the yard very well. It was then just like it is now. . . ." On redirect-examination he testified: "The yard at Weldon is not in every respect a standard yard, the standard width between the centers of tracks is 14 feet. The distance between the main line and pass-track is about one foot eight and one-half inches short of standard." On recross-examination: "The tracks are just the same as I have been knowing them all these years. I knew how wide it was between the tracks just from looking at them. I had never measured them in my life until after I was hurt. I knew they were close together. . . . My feeling was terrible. When my leg was mashed, hardly know how to express it. I, of course, expected the train to kill me; I cannot express how I felt. When the wheel struck my leg it felt like a redhot burning sensation and that kept up for the first five days. I felt like I was standing in fire up to my knee. After the first five days I suffered practically all the time. I still suffer. I have the sensation of my toes being drawn back and my leg aching. It has affected my nervous system." Plaintiff was so mashed and mangled that his right leg had to be amputated about six inches below the knee.

Plaintiff introduced Rule 30 of Rule Book of Seaboard Air Line Railway Company, which is as follows: "The engine bell must be rung when the engine is about to move and while approaching and passing public crossings at grade and while passing stations."

Defendant offered in evidence Rule 103, as follows: "When cars are pushed by an engine, except when shifting or making up trains in yards, a trainman must take a conspicuous position on the front of the leading car, and when shifting over public crossings at grade not protected by a watchman, a member of the crew must protect the crossings. This will also apply to engine moving backward." And also part of General Rule M, as follows: "They (employees) must expect trains to run at any time, on any track, in either direction."

The issues submitted to the jury and their answers thereto, were as follows:

"1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

2. Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer? Answer: No.

3. Did the plaintiff voluntarily assume the risk of injury alleged in the answer? Answer: No.

4. What damages, if any, is the plaintiff entitled to recover? Answer: $35,000.00."

There was evidence supporting the contention of both sides of the controversy.

The other facts necessary and assignments of error will be considered in the opinion.

George C. Green for plaintiff.
W. A. Powell and Murray Allen for defendant.

CLARKSON, J. Under the Federal Employers' Liability Act, the jurisdiction of the courts of the United States is concurrent with that of the courts of the several states, and any case arising under the act and brought in any state court shall not be removable to any of the United State courts. The decisions of the Federal courts control over the State courts in all actions prosecuted in the State courts, but the rules of practice and procedure are governed by the laws of the states where the cases are pending.

Under the Federal Employers' Liability Act, in the present kind of action, the issues ordinarily submitted are (1) negligence; (2) contributory negligence; (3) assumption of risk; (4) damages.

"The first section of the Federal Employers' Liability Act provides that every common carrier by rail while engaging in interstate commerce, and while the servant injured or killed is employed in such commerce, *is liable 'for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier,* or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, tracks, roadbed, works, boats, wharves or other equipments.' . . . The clause relating to negligence in the first section of the Federal Act has two branches; one governing the negligence of any of the officers, agents or employees of the carrier, *which abolishes the common-law fellow-servant doctrine:* and the other relating to defects and insufficiencies due to negligence in the railroad's rolling stock, machinery, track, roadbed, works, boats, wharves or other equipment. These two clauses, it has been held, cover any and all negligent acts of which the carrier could have been guilty under the common law." Roberts Injuries to Interstate Employees, pp. 18 and 19; *Southwell v. R. R.,* 191 N. C., at p. 157.

The third section provides that *contributory negligence shall not bar recovery,* but shall only *diminish the damages,* except that no employee injured or killed where the violation of a safety law for employees contributed to the injury, shall be held to have been guilty of contributory negligence.

The fellow-servant doctrine has been abrogated by the United States statutes as to railroads engaged, as here, in interstate commerce. That question does not arise.

In *Seaboard Air Line R. R. Co. v. Horton,* 233 U. S., at p. 501 (58 L. Ed., p. 1069), *Mr. Justice Pitney* says: "This clause has two branches; the one covering the negligence of any of the officers, agents, or employees of the carrier, which has the effect of abolishing in this class of cases the common-law rule that exempted the employer from responsibility for the negligence of a fellow-employee of the plaintiff," etc. *Reed v. Director-General of Railroads,* 258 U. S., at p. 92 (66 L. Ed., p. 480).

Defendant moved for judgment as in case of nonsuit at the conclusion of plaintiff's evidence, and at the conclusion of all the evidence. C. S., 567.

On a motion to nonsuit, the evidence is to be taken in the light most favorable to plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.

The defendant contends, in support of these assignments of error, "that the sole proximate cause of the plaintiff's injury was his own negligence in stepping from the engine of train No. 85 into a place of safety between the tracks and then onto the pass-track without looking for an approaching train." Can the contention be sustained? If so, the nonsuit should have been granted. We cannot so hold.

The plaintiff was in a place he had a right to be. The two tracks were parallel and close together. He stepped off the engine at Poplar Street, a public crossing in Weldon. He was lulled into security and thrown off his guard as he had left the switch engine and box-car 325 feet from the crossing with positive orders not to move until the through train pulled out, and relied on his orders being obeyed. It was at night, 2:10 a.m. The box-car which struck him had no rear light on it or any person to warn any one at the public crossing of the approach of the backing switch engine and box-car on the pass track—no bell was rung or whistle blown. The engineer of the switch engine from his cab, if he had been keeping a proper lookout, saw, or in the exercise of ordinary care could have seen plaintiff on the steps of engine No. 85, and as a reasonably prudent man he could reasonably anticipate that injury or harm might follow his getting off the through train as it accelerated its speed in pulling out and the danger of the plaintiff in stepping in front of the backing train on the pass track at the Poplar Street crossing. These were, in substance, the allegations in plaintiff's complaint. They were denied by defendant, and the plea of negligence, contributory negligence and assumption of risk set up. The plaintiff's testimony and

other evidence sustained his contentions. The evidence of defendant's witnesses contradicted it. The jury found with the plaintiff.

Under the facts and circumstances of this case, we do not think that the failure of plaintiff in alighting from the engine of train No. 85, where he had a right to be, and stepping on the pass track at the public crossing, in close proximity and not looking back, negligence and the sole proximate cause of plaintiff's injury.

In *International Stevedoring Co. v. Haverly,* U. S. Supreme Court, opinion delivered 18 October, 1926, *Mr. Justice Holmes* says: "This is an action brought in a state court seeking a common-law remedy for personal injuries sustained by the plaintiff, the respondent here, upon a vessel at dock in the harbor of Seattle. The plaintiff was a longshoreman engaged in stowing freight in the hold. Through the negligence of the hatch tender no warning was given that a load of freight was about to be lowered, and when the load came down the plaintiff was badly hurt. The plaintiff and the hatch-tender both were employed by the defendant stevedore, the petitioner here, and the defendant asked for a ruling that they were fellow-servants and that therefore the plaintiff could not recover. The Court ruled that if the failure of the hatch-tender to give a signal was the proximate cause of the injury the verdict must be for the plaintiff. A verdict was found for him, and a judgment on the verdict was affirmed by the Supreme Court of the State. 134 Wash., 235, 245. A writ of *certiorari* was granted by this Court. 269 U. S., 549." The petitioner disputed the common-law right to recover on account of the fellow-servant doctrine. That the case was governed by the Admiralty law that administered the common law. Under Act of 5 June, 1920, ch. 250, sec. 20, 41 Stat., 988, 1007, in substance, any seaman who shall suffer personal injury in the course of his employment shall have the same remedy in case of personal injuries to railway employees. "Stevedores" came under the act, and the judgment was affirmed.

The court below charged the jury correctly what was negligence, and as to negligence and proximate cause left it to the jury to ascertain the facts, and on proximate cause charged as follows: "It is necessary just here to define for you what is meant by proximate cause—what in law is meant by proximate cause. Two elements must be considered: first, negligence, and that such negligence was the proximate cause of the injury, and the burden is upon the plaintiff to satisfy you by the greater weight of the evidence that the defendant was negligent, and that such negligence was the proximate cause of the injury. I have defined for you what is meant by negligence, and I will now instruct you what is the legal definition of proximate cause. The proximate cause of an event must be understood to be that cause which is natural

and in continuous sequence, unbroken by any new and independent cause, produces that event, and without which it would not have occurred. It is the last negligent act without which the injury would never have occurred. It is the responsible cause. It is sometimes referred to by using two Latin words, *causa causans,* which means the immediate cause; the last link in the chain of causation." We can see no error in this charge to the prejudice of the defendant.

"It was said in *Ordegard v. North Wisconsin Lumber Co.,* 110 N. W., 809, 818; 130 Wis., at p. 685: In an action for injuries to a servant, an instruction that 'proximate' cause meant 'the immediate, direct, actual, natural, efficient, and real cause,' was no ground for reversal of a judgment in favor of plaintiff, as it placed a heavier burden on him than the correct rule." *Kepley v. Kirk,* 191 N. C., at p. 695.

Mr. Justice Strong, in *R. R. v. Kellogg,* 94 U. S., p. 474, says: "The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied at the other end, that force being the proximate cause of the movement, or, as in the oft-cited case of the squib thrown in the market place. 2 Bl. Rep., 892. The question always is, Was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? . . . We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault and self-operating which produced the injury. . . . In the nature of things there is in every transaction a succession of events more or less dependent upon those preceding, and it is the province of the jury to look at this succession of events or facts and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time."

Again the same judge says in *Ins. Co. v. Boone,* 95 U. S., 117: "The proximate cause is the dominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in place and time to the loss. . . . 'The inquiry must always be whether there was an intermediate cause disconnected *from the primary fault* and self-operating, which produced the injury.'" *Harton v. Telephone Co.,* 141 N. C., 462-3; *Taylor v. Lumber Co.,* 173 N. C., at p. 115; *Construction Co. v. R. R.,* 184 N. C., p. 179; *Hinnant v. Power Co.,* 187 N. C., 288; *Mangum v. R. R.,* 188 N. C., 695; *Paderick v. Lumber Co.,* 190 N. C., 312; *Kepley v. Kirk, supra.*

Cases denying a nonsuit under facts similar to the present action, are fully set forth in *Moore v. R. R.,* 185 N. C., p. 189; *S. c.,* 186 N. C., 257. See, also, *Bradley v. R. R.,* 126 N. C., 735; *Reid v. R. R.,* 140 N. C., 146; *Norman v. R. R.,* 167 N. C., 533; *Hudson v. R. R.,* 176 N. C., 488; *Parker v. R. R.,* 181 N. C., 102; *Bass v. R. R.,* 183 N. C., 444.

"If, however, there is no reason to apprehend the approach of cars an employee will not be held disentitled to recover by reason of the fact that he failed to look for trains before going on the tracks." 18 R. C. L., p. 668, part sec. 160.

In *Wolfe v. R. R.,* 154 N. C., at p. 575, it is said: "The plaintiff was employed in a most dangerous work, requiring his almost constant presence on the tracks. Under such circumstances the defendant owed him the duty of active vigilance in giving warning of the approach of engines and trains, and the plaintiff had the right to rely upon the performance of this duty in discharging his own duty and caring for his personal safety." *Sherrill v. R. R.,* 140 N. C., 252; *Inman v. R. R.,* 149 N. C., 123; *Zachary v. R. R.,* 156 N. C., 503.

In *R. R. v. Koennecke,* 239 U. S., p. 352: "We see equally little ground for the contention that there was no evidence of negligence. It at least might have been found that Koennecke was killed by a train that had just come in and was backing into the yard, that the movement was not a yard movement; that it was on the main track and that there was no lookout on the end of the train and no warning of its approach. In short the jury might have found that the case was not that of an injury done by a switching engine known to be engaged upon its ordinary business in a yard, like *Aerkfetz v. Humphreys,* 145 U. S., 418, but one where the rules of the company and reasonable care required a lookout to be kept. It seems to us that it would have been impossible to take the case from the jury on the ground either that there was no negligence or that the deceased assumed the risk. Upon a consideration of all the objections urged by the plaintiff in error in its argu-

ment and in its briefs, we are of opinion that the judgment should be affirmed." *Erie R. Co., v. Purucker,* 244 U. S., p. 320.

As to the second issue, of contributory negligence, the defendant prayed the court to instruct the jury that upon all the evidence in the case they should answer the second issue "Yes." The court declined to do so and in this we think there was no error. The court charged as follows: "On this second issue, it is necessary that I again address myself to the word 'negligence.' That means I must further instruct you in the law, because the negligence spoken of in this second issue—the negligence of the plaintiff—is called contributory negligence. I instruct you, gentlemen of the jury, that contributory negligence is the negligent act of a plaintiff which, concurring and coöperating with the negligent act of the defendant, is the proximate cause of the injury. The same rule of due care which the defendant is bound to observe applies equally to the plaintiff. There is really no distinction between negligence of the plaintiff and negligence of the defendant, except the plaintiff's negligence is called contributory negligence. The law further says, gentlemen, that contributory negligence may consist of some act of omission or act of commission. It is the lack of due diligence or the lack of due care in doing the wrong thing at the time and place, or in doing nothing when something should have been done. That is to say, did the plaintiff fail to exercise due care which an ordinarily prudent man would have exercised under similar circumstances, and was said failure so to do the proximate cause of his injury? As I stated to you heretofore, the defendant has the burden of proof, and if the defendant has satisfied you by the greater weight of the evidence that the plaintiff by his own negligence contributed to his injury, it would be your duty to answer the second issue, 'Yes.'"

"Contributory negligence under the Federal Employers' Liability Act has been defined by the United States Supreme Court in the following language: 'Contributory negligence involves the notion of some fault or breach of duty on the part of the employee, and since it is ordinarily his duty to take some precaution for his own safety when engaged in a hazardous occupation, contributory negligence is sometimes defined as a failure to use such care for his safety as ordinarily prudent employees in similar circumstances would use.' *Seaboard Air Line Ry. Co. v. Horton,* 233 U. S., 492, 58 L. Ed., 1062. In another case before the Supreme Court of the United States the following definition of contributory negligence was approved: 'Contributory negligence is the negligent act of a plaintiff which, concurring and coöperating with the negligent act of a defendant, is the proximate cause of the injury.' *Norfolk & W. R. Co. v. Earnest,* 229 U. S., 114, 57 L. Ed., 1096." Roberts, *supra,* p. 218, sec. 112.

The charge is substantially in the language of the rule as laid down in *Moore v. Iron Works,* 183 N. C., p. 438; *Boswell v. Hosiery Mills,* 191 N. C., p. 549.

As to the third issue—assumption of risk—the defendant prayed the court to instruct the jury that upon all the evidence in the case they should answer the third issue "Yes."

In *Reed v. Director General, supra,* at p. 95, it is said: "In actions under the Federal Act the doctrine of assumption of risk certainly has no application when the negligence of a fellow-servant which the injured party could not have foreseen or expected is the sole, direct and immediate cause of the injury. To hold otherwise would conflict with the declaration of Congress that every common carrier by railroad while engaging in interstate commerce shall be liable to the personal representative of any employee killed while employed therein when death results from the negligence of any of the officers, agents or employees of such carrier."

"A freight conductor did not assume the risk of the negligence of a flagman working under him who failed to protect the rear of the train." *Penn. Ry. Co. v. Goughnor,* 126 C. C. A., 39, 208 Fed., 961; Roberts, *supra,* p. 205; *Chesapeake & O. Ry. Co. v. DeAtley,* 241 U. S., 310 (60 L. Ed., 1016); *Boldt v. Penn. Ry. Co.,* 245 U. S., 441 (62 L. Ed., 385).

In *Chicago, Rock Island & Pacific Ry. Co. v. Ward,* 252 U. S., p. 18 (64 L. Ed., 434), it is said: "It was a sudden emergency, brought about by the negligent operation of that particular cut of cars, and not a condition of danger, resulting from the master's or his representatives' negligence, so obvious that an ordinarily prudent person in the situation in which Ward was placed, had opportunity to know and appreciate it, and thereby assume the risk."

The court gave full instructions on assumption of risk and was, perhaps, more liberal to defendant than it was entitled to under the facts and circumstances of this case. The jury passed on the facts and answered the issue "No," and we can see no error in the charge.

On the fourth issue, as to damages, the court below charged: "I instruct you that in an action for damages for injury caused by negligence, the plaintiff would only be entitled to recover what sum of money, paid at the present time, in a lump sum, would represent the *reasonable present value* of his diminished power in the future and the difference between what he would have been able to earn in the future but for such injury, and the sum he will be able to earn in the future in his present condition. (The latter part shows that diminished power meant earning power.) A man 46 years old may be expected to live 23 8/10 years. These figures, gentlemen of the jury, are taken from the mortuary tables of life insurance companies. They do not control,

that is, upon the question of the determination of human life figures do not control; they are not given to control you, but merely to guide you. They are based upon the law of averages, and there is no certainty that any person will live the average duration of life, because a man may live longer or less time than the average. I instruct you, gentlemen of the jury, that the plaintiff, if he be entitled to recover at all, would be entitled to recover as damages or compensation in a lump sum for all injuries, past and prospective, as a result of the defendant's wrongful and negligent acts. This may embrace loss of time, loss of ability to perform physical labor or decreased capacity to earn money. That is, if you are satisfied by the greater weight of the evidence that the plaintiff is entitled to recover, he would be entitled for loss of both bodily and mental powers, for inconvenience and humiliation because of the loss of his leg in consequence of his injuries."

We think the above charge is borne out in *Fry v. R. R.*, 159 N. C., 361; *Johnson v. R. R.*, 163 N. C., 431; *Hill v. R. R.*, 180 N. C., 490; *Ledford v. Lumber Co.*, 183 N. C., 614; *Strunks v. Payne*, 184 N. C., 582; *Shipp v. Stage Line, ante*, 475.

In a case of wrongful death, arising under the Federal Employers' Liability Act, and in such cases arising under the State law, there is a marked distinction. See *Carpenter v. Power Co.*, 191 N. C., 130. The present action is not for wrongful death, but in *Chesapeake & O. R. Co. v. Kelly*, 241 U. S., p. 485, wrongful death case, the *present value*, or *present worth rule*, is recognized.

The Federal Employers' Liability Act provides that contributory negligence shall not bar recovery, but shall only diminish the damages, etc. On this aspect, the charge was full and accurate and no exception taken. We have discussed only what we consider the main assignments of error; the others we do not consider material or present any novel or serious questions of law. Upon the whole record we can find no prejudicial or reversible error.

No error.

STATE v. JOE HARDEE AND EVERETT HARDEE.

(Filed 17 November, 1926.)

1. Homicide—Instructions—Evidence—Less Degree of Crime — Indictment.

Upon the trial under an indictment for murder it is the duty of the trial judge, under supporting evidence, to declare and explain the law upon the less offense of manslaughter, with the burden of proof on defendant, and a statement of the contentions of the parties, etc., with a mere announcement of the principle is insufficient. C. S., 564, 4639.

2. Same—Manslaughter—Evidence.

Where the evidence tends to show that the prisoner and deceased, each armed with deadly weapons, entered willingly into the fight which caused the latter's death, it is sufficient to sustain a verdict of manslaughter, under proper instructions of the law from the court.

3. Same—Instructions.

Where the instructions of the court to the jury of the law arising under the evidence, upon the principles of murder and manslaughter, construed as a whole, and not disjointedly, are correct and not misleading, prejudicial error will not be held on appeal.

4. Constitutional Law—Homicide—Instructions—Presence of Prisoner—Appeal and Error.

Where the judge has inadvertently charged upon the trial for a homicide that the State must prove its case by the greater weight of the evidence, and immediately after the jury has withdrawn for its deliberation, defendant's counsel has called this error to the court's attention, and informed the court that he had unmistakably corrected his error in other portions of the charge, and that it was useless to recall the jury, and thereupon the judge went to the jury room and corrected his error, standing in the open doorway of the jury room just beyond that of the unlocked courtroom door, where the defendants and their attorneys were sitting, having declined to accompany the judge: *Held*, not reversible error in violation of the constitutional right of the defendant to be present.

APPEAL by defendants from *Daniels, J.*, at July Term, 1926, of DURHAM.

The defendants were indicted for the murder of one Robert Steele and were convicted of murder in the second degree. From the judgment pronounced they appealed, assigning error.

There is evidence tending to show the following circumstances: About noon on Sunday, 23 May, 1926, Clark, Moore, Andrews, and the defendants went from Carrboro to the home of the deceased in the city of Durham; there Everett Hardee bought two bottles of liquor from the deceased and soon afterwards all were more or less under the influence of drink. Mrs. Steele, wife of the deceased, was across the street at Victoria Brown's. Returning home, "she went into the house after these five men." She found them in the kitchen around a table on which there was a half pint of whiskey. Moore and Clark were the first to leave. She knocked a glass from her husband's hand and Andrews cursed and struck her. She ran Andrews into the street, but he went back to the house and tried to get in at a window. She then struck at Andrews with a baseball bat and he moved on. She, her husband and the defendants were at the front door. She started for a policeman, and Everett knocked her down in the street and took the bat from her. The

deceased caught Everett around the neck; Everett "slung him loose, hit his face with the bat, knocked him down, stepped across him and stood over him and hit him in the head like he was mauling rails." Death resulted in a few days. There was evidence that Joe was present aiding and abetting.

Much of the material evidence for the State was contradicted by that for the defendants. There was evidence that Mrs. Steele assaulted the defendants with a pistol and a bat, and that Joe in self-defense struck the deceased with the bat, and that Everett did not strike him at all. A minute account of the difficulty is not necessary to an understanding of the exceptions.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

R. O. Everett and Gattis & Gattis for defendants.

ADAMS, J. The defendants assign for error the alleged failure of the trial judge to declare and explain the law of manslaughter. C. S., 564. We have insistently adhered to the doctrine that where a person indicted for a crime may under the bill be convicted of a lesser degree of the same crime and there is evidence tending to support the milder verdict, the person charged is entitled to have the law with respect to the lesser offense submitted to the jury under a correct charge; also that a statement of the contentions or of certain phases of the evidence accompanied with a mere enunciation of a legal principle is not a compliance with the statute. *S. v. Lee, ante,* 225; *Watson v. Tanning Co.,* 190 N. C., 840; *Wilson v. Wilson, ibid.,* 819; *S. v. Williams,* 185 N. C., 685.

As there was some evidence of manslaughter, it was incumbent on the judge in his instructions to the jury to declare and explain the law applicable to this offense. C. S., 564, 4639. It is apparent from the verdict that the jury accepted the State's contention as to the circumstances of the homicide, *i. e.,* that Everett Hardee struck the fatal blow and that Joe Hardee was present aiding and abetting. In the charge manslaughter was defined, the burden of showing to the satisfaction of the jury circumstances to reduce the homicide from murder in the second degree to manslaughter was properly placed upon the defendants, and then the specific instruction was given that if Everett Hardee saw the deceased approaching him with a drawn knife in a threatening attitude and being armed with a baseball bat himself, entered willingly into a fight with the deceased, both being armed with deadly weapons, and not in self-defense, and inflicted a blow with the bat which resulted in the death of the deceased, he would be guilty of manslaughter. It will

be noted that the instruction carefully distinguishes the willingness to fight in the beginning from fighting in self-defense, as explained in other parts of the charge, and states the law as declared in *S. v. Harrell,* 107 N. C., 944; *S. v. Crisp,* 170 N. C., 785; *S. v. Wentz,* 176 N. C., 745. The principle laid down in *S. v. Baldwin,* 155 N. C., 496, and *S. v. Pollard,* 168 N. C., 116, in reference to fighting willingly at any time up to the fatal moment has no application. The jury was told further that if Everett was guilty of manslaughter and Joe was present aiding and abetting when the assault was made he also would be guilty. Of these instructions the defendants cannot justly complain; there was no evidence to justify an application of the doctrine of cooling time. *S. v. Powell,* 168 N. C., 134; *S. v. Robertson,* 166 N. C., 356; *S. v. Jarrell,* 141 N. C., 722.

Three prayers for instructions were tendered by the defendants the substance of which, applicable to various phases of the evidence, was this: If Joe Hardee had reason to believe, and did believe, that it was the purpose of the deceased to take his life or to inflict great bodily harm he had a right to protect himself and secure his own safety, and if in doing so he killed the deceased with a baseball bat he would not be guilty of any crime. His Honor gave the several prayers, but modified them by adding as a proviso that the defendant did not enter into the fight willingly and did not use more force than appeared necessary to repel the assault. The prayer as tendered might well have been refused, and the further instructions certainly deprived the defendants of no substantial right. To avail himself of the plea of self-defense the defendant must show that he is himself without fault. *S. v. Crisp, supra; S. v. Kennedy,* 169 N. C., 326; *S. v. Robertson, supra; S. v. Hough,* 138 N. C., 663; *S. v. Blevins,* 138 N. C., 669; *S. v. Brittain,* 89 N. C., 481.

The exception chiefly relied on is based upon the following occurrence: "The court concluded his charge to the jury about 10:30 at night; and while the jury were retiring, or just after they had retired to the jury room to consider their verdict, one of the counsel for the prisoners called the court's attention to the use of the expression, 'by the greater weight of the evidence' in that part of the court's charge embraced in defendant's Exception No. 1. Whereupon, the trial judge thanked counsel for calling attention to the error and stated that he would call the jury back and correct it. Counsel for defendants then said it was not necessary to call the jury back and make the correction because they considered the use of the language set out above merely 'a slip of the tongue,' and that the court had charged in all the rest of the charge the correct rule that the jury would not be misled by the inadvertent use of the words, 'by the greater weight of the evidence,' in-

stead of the usual formula, 'beyond a reasonable doubt.' The presiding judge, however, stated that he thought it best to correct the error and would do so before the jurors began their deliberations; and as counsel for defendants and the State did not wish to have the jury recalled to the box, he invited them to accompany him to the door of the jury room where, in their hearing, he would make the necessary correction. Counsel for both State and the defendants, thereupon said that they did not care to go, and advised the presiding judge that they had no objection to his going to the door of the jury room and correcting the error without recalling the jury to the courtroom. All this took place in the courtroom immediately upon the retirement of the jury, and in the presence and hearing of the prisoners and their counsel."

The judge then went to the door of the jury room and told the jury to disregard the instruction that "they should be satisfied from the evidence and by its greater weight," and then gave the definite instruction, "Before you can convict of murder in the first degree you must be satisfied from the evidence beyond a reasonable doubt that the blow was struck with deliberation and premeditation."

The record proceeds: "This instruction was given by the judge, while standing in the open door of the jury room. This room does not open directly into the courtroom, but it is reached from the courtroom by a door that leads into a hallway, and this hallway at one end leads to the judge's chamber, and at the other into the jury room. The instructions were not given in the presence of prisoners or their counsel, but within a few steps of them as they sat within the bar, and they, by walking across the bar to the door leading into the hallway above referred to could have heard, if they had desired to do so."

The defendants now insist that they could not waive their presence and that it was the duty of the court to see that they were present at every stage of the trial. There are authorities to the effect that the absence of a prisoner during the course of his trial will vitiate his conviction of a capital felony. *S. v. Blackwelder,* 61 N. C., 38; *S. v. Dry,* 152 N. C., 813. See, also, *S. v. Matthews,* 191 N. C., 379. "The rule that he must be present in capital felonies is in *favorem vitæ.* It is founded in the tenderness and care of the law for human life and not in fundamental right—certainly not in this State, as seems to be supposed by some persons." *Merrimon, J.,* in *S. v. Kelly,* 97 N. C., 404.

The rule has been enforced in cases in which the verdict was for the capital felony; it has never been enforced in this State in a case where the verdict was for a lesser degree of homicide and where the presiding judge at the request of the defendant corrected an admitted "slip of the

tongue" by giving an instruction plainly favorable to the defense. Nothing was done in the absence of the defendants to prejudice their rights. The corrected instruction, substituting "beyond a reasonable doubt" for "by the greater weight of the evidence" related entirely to murder in the first degree and of this crime the defendants were acquitted. If there was error it was cured by the verdict. Indeed, this exception was not taken at the time; its first appearance was when incorporated in the case on appeal. To grant a new trial on this exception would be the veriest technicality and an unwarranted extension of the constitutional privilege. The modern tendency is against technical objections which do not affect the merits of the case. We find

No error.

M. M. RITCHIE v. MRS. G. G. RITCHIE ET AL.

(Filed 17 November, 1926.)

1. Judgments—Contracts—Vendor and Purchaser—Counterclaims.

Where, in an action for a money demand for goods sold and delivered, brought in the court of a justice of the peace and tried on appeal in the Superior Court, wherein defendant recovered upon his counterclaim set up by way of answer, a less sum than that ascertained to be due by him to plaintiff, the judgment awarding the plaintiff the difference so found is correct.

2. Same—Courts—Appeal—Costs—Statutes.

On an appeal from the court of a justice of the peace to the Superior Court, the trial in the Superior Court is *de novo*, and its costs in both courts are required by the statutes applicable to be taxed against the unsuccessful party, or, as in this case upon a judgment in plaintiff's favor for the difference between the amount of her demand over that allowed upon defendant's counterclaim set up by way of answer. C. S., 661, 1256.

CIVIL ACTION, before *Stack, J.*, and a jury, at February Term, 1926, of STANLY.

The plaintiff brought a suit against the defendants in a court of the justice of the peace, alleging that the defendants were indebted to him in the sum of $143.19. The defendants denied the indebtedness to the plaintiff and set up a counterclaim against the plaintiff for $227.67 for lumber sold and delivered by the defendants to the plaintiff. The judgment of the justice of the peace recites that the defendants were indebted to the plaintiff in the sum of $143.19, and that the plaintiff

was indebted to the defendants upon their counterclaim in the sum of $160.49, and thereupon rendered judgment against the plaintiff for the difference, to wit, the sum of $17.30. Whereupon, the plaintiff appealed to the Superior Court. The defendants did not appeal. The case was tried upon issues directed to the claim of plaintiff and the counterclaim of defendants. By consent of the parties the issue in favor of plaintiff was answered $143.19 with interest, and the issue upon defendant's counterclaim was answered by the jury awarding the defendants $132.86 with interest upon their counterclaim.

The portion of the judgment pertinent to this appeal is as follows: "It appearing from the answers to the above issues by the jury that the amount due the plaintiff on his account sued on in this action is $143.19, which was admitted by the defendants, and that the amount due the defendants by the plaintiff on their counterclaim set up in their answer is $132.86, and that the defendants are indebted to the sum of $10.33, the difference between the plaintiff's claim sued on and admitted by the defendants, and the defendants' counterclaim allowed by the jury, as shown in issue No. 2 above.

"It is thereupon ordered, decreed and adjudged that the plaintiff recover and have judgment against the defendants for and in the sum of $10.33, with interest from 5 May, 1922, until paid.

"It is further ordered and adjudged that the plaintiff pay one-half of the cost incurred in the justice's court and that the defendants pay the other half of the cost incurred in the justice's court.

"It is further ordered and adjudged that the plaintiff pay the cost incurred in the Superior Court, to be taxed by the clerk of this court."

From the judgment so rendered the plaintiff appealed to the Supreme Court.

W. L. Mann for plaintiff.
R. L. Smith & Son and J. R. Price for defendants.

BROGDEN, J. The defendants alleged as a basis of their counterclaim against the plaintiff that they had sold and delivered to him certain lumber at the price of $20.00 per thousand for the rough lumber and $25.00 per thousand for the better grades. The defendants offered evidence tending to show that the lumber was delivered to the plaintiff, and that it was stacked up by him upon the mill yard, and that he accepted it, and that no notice was given defendants that the lumber was not according to contract until after the lumber plant of plaintiff had been destroyed.

There was also evidence to the effect that the plaintiff had designated where the lumber should be unloaded and stacked, and that plaintiff had sold part of the lumber to certain parties and appropriated the proceeds thereof to his own use. The plaintiff contended that the lumber was stacked up by him in order to get it out of his way, and that he had refused to accept it because it was not of the grade specified in the contract of purchase.

The trial judge permitted evidence as to the market value of the lumber over plaintiff's objection, the plaintiff contending that there was an express contract between the parties, and therefore no evidence was admissible tending to show the market value of the property at the time it was delivered.

The trial judge charged the jury in substance, that if the jury found by the greater weight of evidence that the defendants delivered the lumber to the plaintiff at his plant, and that the plaintiff received it and accepted it and kept it, that the law would imply that he should pay its reasonable market value, whether it was according to the contract or not. The court further charged the jury in substance that if the jury should find from the greater weight of the evidence that the lumber was delivered to the plaintiff, and that he designated a place where it should be placed, stacked it up and counted it, and sold part of it and kept the proceeds of the sale and applied the same to his own use, that this would constitute an acceptance of the lumber and render the plaintiff liable for the value of the lumber received.

The principles of law thus declared are correct. *Brown v. Morris,* 83 N. C., 251; *Simpson v. R. R.*, 112 N. C., 703; *McCurry v. Purgason,* 170 N. C., 463.

The principal exception relied upon by the plaintiff, and the one urged in the oral argument, was to that portion of the judgment taxing the costs in the Superior Court against the plaintiff and one-half the costs incurred in the court of the justice of the peace.

C. S., 661, provides that when the return of an appeal from a court of the justice of the peace is made to the Superior Court, that the clerk of the appellate court shall docket the case for a new trial of the whole matter. Hence when the plaintiff appealed from the judgment of the justice of the peace and the appeal was duly docketed, the cause should have been tried in the Superior Court *de novo.*

C. S., 1256, provides: "On an appeal from a justice of the peace to a Superior Court . . . if the appellant recovers judgment in the appellate court, he shall recover the costs of the appellate court and those he ought to have recovered below had the judgment of that court been correct, and also restitution of any costs of any court appealed from which he has paid under the erroneous judgment of such court."

Costs are entirely creatures of legislation and constitute an incident of the judgment. *Williams v. Hughes,* 139 N. C., 17; *Waldo v. Wilson,* 177 N. C., 461.

In *S. v. Horn,* 119 N. C., 853, *Clark, J.,* says: "There is no exception in State cases to the rule prevailing in civil cases that the costs follow the result of the final judgment." The true and only test of liability for costs depends upon the nature of the final judgment, and the party cast in the suit is the one upon whom the costs must fall. *Kincaid v. Graham,* 92 N. C., 154; *Williams v. Hughes,* 139 N. C., 17; *Smith v. R. R.,* 148 N. C., 334; *Cotton Mills v. Hosiery Mills,* 154 N. C., 462. In equitable proceedings costs are in the discretion of the court. *Yates v. Yates,* 170 N. C., 535; *Hare v. Hare,* 183 N. C., 421. But this case is not an equitable proceeding, and the costs must follow the final judgment.

The defendants rely upon the case of *Southerland v. Brown,* 176 N. C., 187. In that case the plaintiff recovered judgment for specific personal property, and the defendant a judgment for $1.55 in money. *Justice Walker* says: "The latter cannot be deducted from the former, as it is impossible, in the nature of things, to do so. Plaintiff will seize and take the property into his possession, while the defendant will get his money by execution and levy upon any property of plaintiff. The recoveries therefore are distinct."

Justice Walker says further: "It is not like a claim for a money judgment and a counterclaim of the same kind, in which the smaller amount recovered would be deducted from the larger and judgment given for the difference to the party entitled to it."

Therefore, the case of *Southerland v. Brown, supra,* supports the contention of the plaintiff, for this present case is a claim for a money demand, and the counterclaim is of the same kind, and the smaller amount recovered is deducted in the judgment from the larger amount, and judgment given for the difference to the party entitled to it. Hence the recoveries are not distinct, but both recoveries are based solely upon money demands between the parties, and the plaintiff, having recovered upon such demands a final judgment for the difference, is entitled to recover the entire costs under the statute and the decisions of this Court.

The judgment will be modified to the extent of taxing the defendants with all court costs, and with this modification the judgment is

Modified and affirmed.

D. J. LAMB v. J. W. BOYLES.

(Filed 17 November, 1926.)

1. Appeal and Error—Trial—Actions.

A party may not elect or try his case in the Superior Court upon one theory, and on appeal have the Supreme Court consider it upon a different theory.

2. Evidence—Res Ipsa Loquitur — Soft Drinks — Injurious Substances Causing Sickness.

Where the plaintiff seeks to recover damages for sickness caused by the defendant's negligence in selling him ale to drink in a bottle containing a deleterious or injurious substance, it is required of him to show directly by his evidence that such ingredient was contained in the bottle he had bought, and it may not be inferred by the fact that after drinking the ale he became sick and was laid up, the doctrine of *res ipsa loquitur* not applying.

3. Same—Conflicting Inferences.

Where the evidence admits of two legal inferences, both in favor of or against the plaintiff, the doctrine of *res ipsa loquitur* is not available to him.

APPEAL by defendant from *Harwood, J.*, at July Term, 1926, of the Superior Court of DAVIDSON County from a judgment on the following verdict:

1. Did the defendant negligently manufacture and distribute ale unfit for human consumption, as alleged in the complaint?

Answer: Yes.

2. If so, was the plaintiff injured in consequence of drinking such ale?

Answer: Yes.

3. What damages, if any, has plaintiff suffered by reason of defendant's wrong?

Answer: $500.00.

Phillips & Bower, Walser & Walser and Z. I. Walser for plaintiff.
Raper & Raper for defendant.

ADAMS, J. The plaintiff alleges that on 11 December, 1925, he bought from the Amazon Cotton Mill Cafe a bottle of strawberry ale which the defendant had manufactured and placed on the market; that the bottle contained some kind of noxious substance; that while drinking the ale he was taken sick and in consequence was confined to his bed

for several days; that his vision was impaired; that for many weeks he was unable to do his usual work; that the defendant negligently prepared and sold an unwholesome drink, and that the defendant's negligence was the direct cause of the plaintiff's injury. In the answer the material allegations in the complaint are denied and it is alleged that all known precautions were applied to sterilize the bottles and that the bottle in question did not contain anything that was pernicious or harmful.

There is an allegation in the complaint that the ale was prepared for use as a beverage and that there was an implied warranty of its quality; but the basis of the action is the alleged negligence of the defendant in putting the ale into a bottle containing a deleterious substance. As shown by the issues the case was tried upon this theory; and when a party has elected to try his case on a particular theory he may not change his position with respect to it when the case is heard in the appellate court. *Walker v. Burt,* 182 N. C., 325.

The chief assignment of error is addressed to the refusal of the trial court to dismiss the action as in case of nonsuit. Testimony offered by the plaintiff as to other alleged acts of negligence on the part of the defendant was held not to be admissible as substantive evidence on the first issue and as such it was accordingly excluded. The motion for nonsuit was made to rest, not on the ground of the defendant's nonliability if he was negligent, but on the ground that the admitted evidence does not show actionable negligence. *Ramsey v. Oil Co.,* 186 N. C., 739; *Cashwell v. Bottling Works,* 174 N. C., 324; *Ward v. Sea Food Co.,* 171 N. C., 33; *Dail v. Taylor,* 151 N. C., 285; *Oil Co. v. Deselms,* 212 U. S., 159, 53 L. Ed., 453; 26 C. J., 784, sec. 92 *et seq.*

The evidence most favorable to the plaintiff tends to show that after drinking about half of the ale he became sick, went outside the cafe, vomited, was carried home, was not able to work, suffered from impaired eyesight and for one or two days was blind. There was no analysis of the ale, no direct evidence of any foreign matter, no specific indication of any poison. Negligence is not presumed from the mere fact that the plaintiff was injured *(Isley v. Bridge Co.,* 141 N. C., 220), and there is no evidence of a latent defect actually or constructively known to the defendant. In the absence of more definite evidence of negligence the plaintiff resorts to the doctrine founded on the maxim *res ipsa loquitur*, insisting that the circumstances of his sickness were of such a character as would justify a jury in inferring negligence as the cause of his condition. "The rationale of the doctrine is that in some cases the very nature of the occurrence may of itself, and through the presumption it carries, supply the requisite proof; it is applicable

when, under the circumstances shown, the accident presumably would not have happened if due care had been exercised. The essential import is that on the facts proved, the plaintiff has made out a prima facie case without direct proof of negligence." Labatt on Master and Servant, sec. 843. Several courts have held in effect that the doctrine is not applicable to such facts as were developed in this case. Proof of personal injury resulting from the use of an article sold or manufactured does not of itself make a case of negligence against the seller or the manufacturer. 20 R. C. L., 94. Ordinarily other elemental facts are essential. This was pointed out in *Dail v. Taylor,* 151 N. C., 285. There the Court declined to apply the maxim to proof of an injury caused by the explosion of a coca-cola bottle charged with gas, *Hoke, J.,* remarking that the facts presented a case where it would be entirely unsafe to permit the application of the principle, or to hold that the explosion of one bottle should rise to the dignity of legal evidence sufficient, without more, to carry the case to the jury. The principle is maintained in the later case of *Cashwell v. Bottling Works,* 174 N. C., 324. See *Saunders v. R. R.,* 185 N. C., 289.

In *Bottling Co. v. Sindell.* 140 Md., 488, cited by the plaintiff, the evidence disclosed broken glass in the bottle and the question was whether proof of the glass was evidence of negligence. Questions somewhat similar were presented in *Boyd v. Bottling Works,* 177 S. W. (Tenn.), 80; *Crigger v. Bottling Co.,* 60 L. R. A. (Tenn.), 877; and *Bottling Co. v. Clark.* 89 So. (Ala.), 64. The Massachusetts Supreme Judicial Court has said that the mere presence of a small, flat-headed black tack in a blueberry pie served to a patron by the keeper of a restaurant does not, under the rule *res ipsa loquitur,* establish negligence on the part of the keeper, although the pie was made on his premises. *Ash v. Dining Hall Co.,* 231 Mass., 86, 4 A. L. R. 1556.

In the case at bar there is no evidence that any foreign substance was discovered in the ale or in the bottle. It is too plain for argument that more than one inference may be drawn from the evidence as to the cause of the plaintiff's sickness; and under the circumstances disclosed, as suggested in *Dail v. Taylor, supra.* it would be unsafe to permit the plaintiff to avail himself of the doctrine that the "thing itself speaks." The defendant's motion to dismiss should have been allowed.

Error.

MARGARET HARRISON v. SOUTHERN TRANSIT CORPORATION AND CAROLINA MUTUAL CASUALTY INSURANCE COMPANY.

(Filed 17 November, 1926.)

1. **Actions—Causes of Action—Parties — Pleadings — Misjoinder — Dismissal.**

   A misjoinder of parties and causes of action is demurrable and the action may be dismissed on defendant's motion, but as to misjoinder of causes of action the same will be divided.

2. **Same—Principal and Surety—Statutes—Contracts—Torts.**

   Under our statute (chapter 50, sec. 3, 6(g), Public Laws of 1925), the owners of passenger autobusses for hire upon the highways of this State are required to take out liability insurance for the protection of passengers and others, with the right of action given to the party injured by the negligence of the driver of the autobus, and thereunder a demurrer to the complaint against the autobus company and the surety on his bond, upon the ground that the action against the surety arises in contract, and that of the insured in tort, is bad. Cases where, under the contract, the principal alone is protected against loss, distinguished.

APPEAL by defendants from a judgment of *Bryson, J.*, at March Term, 1926, of the Superior Court of GUILFORD County, overruling their demurrer to the complaint.

The plaintiff is a minor suing by her next friend. The material allegations of her complaint are in effect as herein stated. The Southern Transit Company, a corporation organized under the laws of North Carolina, owned and operated motor vehicles for carrying passengers on the public highways between Raleigh and Greensboro, one of which vehicles, a White truck, was known as "Pathfinder." The city of Greensboro, a municipal corporation, enacted certain ordinances, forbidding the operation within the corporate limits of any motor vehicle in a careless or reckless manner or in such a way as to endanger life, limb, or property; forbidding a vehicle from turning to the left in going into a street without going around the center of intersection; and prohibiting the driving of any vehicle within the safety zone. On 20 July, 1925, the plaintiff was riding her bicycle on North Davie Street going south, and had passed the center of intersection of North Davie and Church streets and entered the safety zone on the right side when the "Pathfinder," moving from the south on North Davie Street, was negligently turned and driven on the left side of North Davie Street without going around the center of intersection. The driver, by "cutting the corner," ran the bus against the plaintiff's bicycle, hurling her to the ground and inflicting the injury of which she complains. The sev-

eral acts of negligence are sufficiently set out. Prior to the injury the Carolina Mutual Casualty Insurance Company executed a bond or policy of casualty insurance in the sum of $25,000 conditioned to indemnify passengers and the public receiving personal injury by any act of negligence, as appears in the opinion.

The defendants demurred to the complaint on two grounds: (1) There is a misjoinder of parties defendant in that there is no privity of contract between the plaintiff and the Casualty Company and no obligation which it owes to the plaintiff; (2) there is a misjoinder of actions in that as to the Transit Corporation the action is in tort while as to the Casualty Company it is a contract.

The demurrer was overruled and the defendants excepted and appealed.

A. C. Davis and Frazier & Frazier for plaintiff.
John W. Hester and Shuping & Hampton for defendants.

ADAMS, J. If a complaint be demurrable for the reason that several causes of action have been improperly united the causes may be divided into as many actions as are necessary to a determination of the controversy; but if there be a misjoinder both of parties and of causes, the action may be dismissed. *Mitchell v. Mitchell,* 96 N. C., 14; *Rose v. Warehouse Co.,* 182 N. C., 107; *Shore v. Holt,* 185 N. C., 312; C. S., 516. In this case the defendants have assigned both grounds of demurrer; we must, therefore, decide whether there is a misjoinder of actions or a misjoinder of parties defendant.

The plaintiff alleges in substance that at the time she was injured the Southern Transit Corporation was a common carrier of passengers on one of the public highways of the State, and was liable in damages for personal injury caused by its negligence, and that its codefendant, the Carolina Mutual Casualty Insurance Company, having executed the bond or policy required by law, thereby became liable to the extent of its contract of indemnity. For this reason it is necessary to inquire into the relation of the parties. There is no question as to the liability of the Transit Corporation for personal injury caused by its negligence; the point in dispute involves the relation of the Casualty Company to its codefendant and to the plaintiff.

The Casualty Company executed its bond or policy in pursuance of a statute enacted by the General Assembly in 1925. Public Laws 1925, ch. 50, sec. 3, 6(g). This bond or policy, in the language of the statute, was "conditioned to indemnify passengers and the public receiving personal injuries by any act of negligence" . . . and was executed "for the benefit of and subject to action thereon by any person or per-

sons who shall have sustained an actionable injury protected thereby, notwithstanding any provision in said bond to the contrary." It is provided that any bond or insurance policy so given shall conclusively be presumed to have been given according to and to contain all the provisions of the statute.

The defendants say that the effect of these provisions when made a part of the bond is to indemnify the Transit Company and to impose no liability upon the surety company except to save the Transit Company from loss. They take the position that the plaintiff's action is in tort; that the relation between the two defendants is contractual; and that the surety company at present is under no kind of obligation to the plaintiff. In support of this position two cases are cited. One is *O'Neal v. Transportation Company,* 129 S. E. (W. Va.), 478. There it was held that the joinder in a declaration of a cause of action sounding in contract with one sounding in tort, is a misjoinder which makes the declaration demurrable; but it was said that the policy of insurance then considered was a contract between the carrier, that is, the assured, and the insurance company, whereby the latter agreed to pay and satisfy judgments finally establishing the liability of the assured. In the other case, *Smith Stage Company v. Eckert,* 7 A. L. R. (Ariz.), 995, the Court said that one of the terms of the policy was that the injured person must first establish his claim by suit against the assured, and that this provision would have been completely nullified if the injured person had been permitted to sue the indemnity company on the policy before he had proved his loss.

But under our statute, which is made a part of the bond or policy, a judgment against the carrier is not prerequisite to a suit on the bond. The Legislature no doubt intended to obviate the necessity of double litigation, for it provided that a carrier by automobile should give a bond in a surety company in an amount to be fixed by the Corporation Commission (unless in lieu thereof national, State, county, or municipal bonds were given), conditioned to indemnify the public as well as passengers receiving personal injuries by any act of negligence, and that this bond should be for the benefit of and subject to action thereon by any person protected thereby who has sustained actionable injury. The carrier and the surety company are thus made jointly liable for the actionable negligence of the assured. In an action against the driver of a jitney bus and a casualty company which had executed an indemnity bond containing provisions very much like these in our statute, the Supreme Court of California, holding that the casualty company was properly joined with the assured in an action for injuries caused by the driver's negligence, said: "To read the statutory requirement into the bond, while it accords to the plaintiff the privilege of joining

the casualty company in a suit against the operator of the bus, introduces no necessary inconsistency into the contract and leaves the substantial rights of the parties unimpaired. The only ground upon which it is suggested that the rights of the defendants might be injuriously affected is that a jury might be expected to return a larger verdict for the plaintiff in a suit in which the casualty company appears as a party defendant, because they would necessarily know that the operator of the bus, whose act actually caused the injury, was insured. The jury would presumably know in any event that the operator was insured, since the law requiring the filing of the bond was one of which all persons would be presumed to have knowledge. Nor can we doubt that the casualty company must be presumed to have taken the knowledge of the jury into account in fixing its charges for executing a bond or policy of insurance issued in assumed pursuance of an ordinance unequivocally prescribing that the bond should be enforceable in favor of the persons injured by the act of the operator of the motor bus." *Milliron v. Dittman,* 181 Pac., 779.

White v. Kane, 192 N. W. (Wis.), 97, was an action against the operator of a taxicab and a liability company which had contracted in its policy to pay the assured the amount of any final judgment for damages recovered against him not exceeding the limit stated. There was an added condition that the policy should be in accord with certain statutes and a designated city ordinance. Among these was a provision that the surety company should pay to any person injured whatever sum he was entitled to, not exceeding a certain amount. It was held that the policy was not an indemnity but a liability contract, and that the assured and the surety company were properly joined as parties defendant. In other courts a similar joinder of parties has been approved. *Boyle v. Liability Ins. Co.,* 115 At. (N. J.), 383; *Devoto v. United Auto Co.,* 223 Pac. (Wash.), 1050.

The prevailing doctrine is that if the indemnity is clearly one against loss suffered by the assured no action can be maintained against the indemnity company until some loss or damage has been shown; but if the contract indemnifies against liability a right of action against the principal and the surety company accrues when the injury occurs. *Clark v. Bonsal,* 157 N. C., 270. See, also, *Newton v. Seeley,* 177 N. C., 528; *Chappell v. Surety Co.,* 191 N. C., 703, 709.

We are of opinion that the action can be maintained against both the defendants and that there is no misjoinder either of causes of action or of parties defendant.

The judgment is

Affirmed.

LIZZIE L. ADAMS v. SOUTHERN TRANSIT CORPORATION AND CAROLINA MUTUAL CASUALTY INSURANCE COMPANY,

AND

S. B. ADAMS v. SOUTHERN TRANSIT CORPORATION AND CAROLINA MUTUAL CASUALTY INSURANCE COMPANY.

(Filed 17 November, 1926.)

(For digest see *Harrison v. Transit Co.*, next preceding case.)

APPEAL by the Casualty Insurance Company from *Shaw, J.*, at June Term, 1926, of the Superior Court of GUILFORD County, overruling its demurrer to the complaint in each case.

Allen Adams and King, Sapp & King, for plaintiffs.
John W. Hester and Shuping & Hampton for defendants.

ADAMS, J. The plaintiff in each of these cases brought suit to recover damages for personal injury caused by the negligence of the Southern Transit Corporation. This defendant filed answers in the two cases; but the Casualty Company demurred to the complaints for misjoinder of parties defendant and of causes of action. The decision in *Harrison v. Southern Transit Corporation et al.* controls in the disposition of these appeals.

In each case the judgment is

Affirmed.

C. B. WAY v. J. T. RAMSEY ET AL., INDIVIDUALLY AND AS TRUSTEES OF THE METHODIST PROTESTANT CHURCH OF SHELBY, J. T. RAMSEY, AS DELEGATE, AND THE METHODIST PROTESTANT CHURCH OF SHELBY.

(Filed 17 November, 1926.)

1. **Pleadings—Demurrer—"Speaking" Demurrer.**

Construing pleadings upon demurrer, the allegations thereof are admitted with all reasonable inferences therefrom in favor of the pleader, and where to sustain the demurrer it becomes necessary to set up further matter in defense, it is bad as a speaking demurrer.

2. **Religious Societies—Churches—Ministers of the Gospel—Contracts—Principal and Agent—Salaries.**

A body of men constituting a religious denomination is a *quasi* corporation, and confers upon its duly appointed officers or trustees the power to make contracts with pastors or ministers of the Gospel to take

charge of its religious affairs, and when these properly constituted agencies acting alone as such make a contract of this character, they are not liable individually for the payment of the salary agreed upon to be paid by the congregation they represent.

3. Same.

A contract made by the congregation of a church for the payment of the salary of their duly appointed minister of the Gospel, is enforceable in certain instances.

APPEAL by plaintiff and defendants from *Shaw, J.*, at May Term, 1926, of DAVIDSON. Affirmed.

In his complaint the plaintiff alleges that the defendants contracted with him for his services as pastor of the Methodist Protestant Church of Shelby for one year, beginning in November, 1924, at an agreed salary of $1,100; that he complied with his part of the contract; that the defendants have paid on the contract $771.94, leaving unpaid the sum of $328.06; that he has demanded the remainder alleged to be due and the defendants have refused to pay it. He alleges that the church, by its agent, trustees, and stewards acquiesced in and ratified the acts of its agent in securing his services and permitting him to remain as pastor for the year without objection and by paying a part of his salary; that Ramsey, Gantt, and Chapman are trustees; that Ramsey was a duly elected delegate to the conference held in November, 1924; that he is also treasurer of the church; that McFarland, Chapman and Johnson are members of the church and of its board of stewards; and that the Methodist Protestant Church of Shelby is a corporation and the owner in fee of a lot and church building in Cleveland County. He sues to recover the remainder alleged to be due on his salary.

A demurrer was filed on behalf of all the defendants and it was sustained as to all of them except the Methodist Protestant Church of Shelby, and as to this defendant it was overruled. The plaintiff and the church excepted and appealed.

A. J. Newton and Walser & Walser for plaintiff.
B. T. Falls for defendants.

ADAMS, J. By filing a demurrer the defendants admit the plaintiff's allegations and such inferences as may reasonably be drawn therefrom and present the question whether in law the complaint states a cause of action against all the defendants or against either of them. *Sandlin v. Wilmington,* 185 N. C., 257; *Manning v. R. R.,* 188 N. C., 648, 663.

Under our statute law an organized body of men constituting a religious congregation is a *quasi* corporation with power to appoint and remove its duly constituted officers and agents. The acts of such officers and agents performed within the scope of delegated authority are usually treated as the acts of the congregation or society. *Lord v. Hardie,* 82 N. C., 241; *St. James v. Bagley,* 138 N. C., 384; C. S., 3568 *et seq.* This is in accord with the general doctrine: a contract made by a known agent acting within the scope of his authority for a disclosed principal, nothing else appearing, is the contract of the principal alone (21 R. C. L., 846), although the agent of a disclosed principal may by special agreement bind himself to performance of the contract. *Caldwell County v. George,* 176 N. C., 602. The plaintiff alleges that the delegate, the trustees, and the stewards were the agents of the church; if, as alleged, they made the contract as agents of a disclosed principal they are not thereby personally obligated to make good the deficiency in the salary. The result is that the judgment sustaining the demurrer as to all the defendants except the church, or *quasi* corporation, must be affirmed.

The other question is whether the complaint sets out a cause of action against the Methodist Protestant Church of Shelby. As to this the defendant impeaches the sufficiency of the complaint on the ground that the plaintiff was an appointee of the Conference; that as no fund is set apart for the payment of the plaintiff's salary he must depend upon voluntary contributions; that this defendant had no voice in procuring the plaintiff's services; and finally that the maintenance of the action is incompatible with the plaintiff's commission.

Some of these objections we cannot consider. They are in the nature of a "speaking demurrer" in that they invoke the aid of matters not appearing in the preceding pleading—matters which can be pleaded as a defense only by filing an answer to the complaint. *Sandlin v. Wilmington, supra.*

For the present purpose we may admit, without deciding, that the pastor of a religious congregation who relies entirely upon voluntary contributions for his salary cannot maintain an action therefor. 23 R. C. L., 465. Still, the question of liability for the salary of a minister or pastor is governed by the principles which prevail in the law of contracts, and it is generally held that a valid contract for the payment of such a salary will be enforced. The salary to be paid and the terms upon which the pastoral relation shall be formed ordinarily are to be determined by the parties themselves or by some appropriate tribunal created by the church. This defendant contends that its rela-

tion to the plaintiff grew out of a system of ecclesiastical control to which the plaintiff was subject, and that disregard of the exercise of such control by a proper church tribunal would tend to the subversion of the organization. In reality this is possible; but this defense is not pleaded by the demurrer. The substance of the complaint is, not that the plaintiff was appointed by the Conference or by any other supervising authority, but that the plaintiff and the Methodist Protestant Church of Shelby without any intervening agency made an express contract, the terms of which are stated; the demurrer admits that the contract was made as alleged; it thereby admits that a cause of action exists. In the fifth paragraph of the complaint there is a reference to the Methodist Protestant Conference held in November, 1924—but a reference only. The defense relied on here is similar to that which was sustained in *Baldwin v. First Church,* 52 L. R. A. (N. S.), 171; but in that case an answer was filed setting forth all the facts. Whether the defense proposed in the present case is valid we need not consider, because, as indicated, it cannot be interposed by demurrer. *St. Luke's Church v. Matthews,* 6 A. D., 619; *Presbyterian Church v. Myers,* 38 L. R. A., 687, and annotation; 34 Cyc., 1144; 24 A. & E., 334. We find no error in the judgment overruling the demurrer of the Methodist Protestant Church of Shelby. The judgment is therefore affirmed on both appeals.

Affirmed.

MERCHANTS BANK & TRUST CO. v. JOHN L. WIMBISH ET AL.

(Filed 17 November, 1926.)

1. **Deeds and Conveyances—Principal and Agent—Parol Authority to Fill in Blanks.**

   In order to create a valid agency to sell land and make a conveyance, there must be a writing under seal creating the agency, and where a deed has been duly executed excepting the amount of the consideration and the name of the grantee, and delivered to another to fill in the blanks when a purchaser was found, the authority thus conferred would rest in parol, and therefore the deed thus made would be invalid as a deed.

2. **Same—Equity—Contracts to Convey Lands.**

   While a deed with the amount of consideration and the name of the grantee left out to be filled in by an agent upon his finding a purchaser, will not when so filled out operate as a deed, it is in equity enforceable by the purchaser so found, and upon the filling in of the blanks is a valid contract to convey.

BANK *v.* WIMBISH.

APPEAL by defendants, Wimbish and wife, from *Raper, Emergency Judge,* at February Term, 1926, of FORSYTH.

The plaintiff brought suit and filed a creditors' bill to set aside certain conveyances of land executed by the appellants to their codefendants Hanes and Mackie. There were six issues; the last three were not answered; on the first three the verdict was as follows:

1. Were the paper-writings from John L. Wimbish and wife, Riddie E. Wimbish, to the property described in said paper-writings, recorded in Deed Book 187, pages 103 and 104, office of the register of deeds of Forsyth County, North Carolina, delivered to the defendant, Frank W. Hanes, in blank, and before the names of the grantees named in said paper-writings were inserted therein, as alleged in the complaint? Answer: Yes.

2. Was the paper-writing from John L. Wimbish and wife, Riddie E. Wimbish, to the property described in said paper-writing, recorded in Deed Book 187, page 102, office of the register of deeds of Forsyth County, North Carolina, delivered to the defendant, Farms Development Company in blank and before the name of the grantee named in said paper-writing was inserted therein, as alleged in the complaint? Answer: Yes.

3. Was the paper-writing from John L. Wimbish and wife, Riddie E. Wimbish, to the property described in said paper-writing, recorded in Deed Book 193, page 44, office of the register of deeds of Forsyth County, North Carolina, delivered to the defendant, J. H. Mackie, in blank and before the name of the grantee named in said paper-writing was inserted therein, as alleged in the amended complaint? Answer: Yes.

It was thereupon adjudged that the written instruments referred to in the first and third issues were void and should be set aside only to the extent of authorizing execution on judgments previously given against Wimbish in favor of the Merchants Bank and Trust Company and other creditors named in the judgment, and that as the Farms Development Company had not been made a party the court had no jurisdiction to render judgment on the second issue.

The defendants Wimbish and wife tendered a judgment providing for the total and unlimited annulment of the instruments referred to in the second and third issues and for their cancellation of record; providing also that the tracts be sold separately and that no more land be sold than was necessary to pay certain judgments therein set out. The trial judge declined to sign this judgment. Wimbish and his wife excepted to the judgment signed and to the court's failure to sign the judgment tendered and appealed to the Supreme Court.

J. E. Alexander and L. M. Butler for the plaintiff.

Wallace & Wells and Manly, Hendren & Womble for John L. Wimbish and his wife.

ADAMS, J. The only appellants are John L. Wimbish and Riddie E. Wimbish, his wife. Conceding the right of the plaintiffs to have the deeds set out in the first and third issues canceled and to have execution issued on the judgments, the appellants prosecute the appeal against their codefendants.

It is alleged in the complaint that these deeds when signed by Wimbish and his wife were blank as to the grantees; that they were to be held in escrow by Hanes until purchasers of the property were found; that the names of the purchasers were then to be inserted and the deeds delivered; that Hanes inserted his own name as grantee in two of the deeds and Mackie's in another. The appellants admit these allegations and say that the pretended conveyances are void and that they should be canceled unconditionally. The other defendants join issue and contend that the deeds convey a good title. It will be seen, then, that the appeal involves a controversy between the defendants, the question being whether the position of the appellants can be maintained, or whether the judgment they tendered should have been signed.

There is an unbroken line of our decisions which hold that a bond signed and sealed in blank is incomplete and that authority to make a deed cannot be conferred verbally, but must be created by an instrument of equal dignity. The first of these cases is *McKee v. Hicks*, 13 N. C., 379, in which it is said that if an instrument with a seal to it is not completely executed by signing, sealing, and delivering, it cannot be made complete by any act of an unauthorized agent. Approving this decision *Chief Justice Ruffin* remarked: "No person will argue in favor of a deed of conveyance in which the name of the bargainee, for instance, or the description of the land, were inserted after execution by the vendor and in his absence, although done without corruption, and by some person whom he requested to do it. It would subvert the whole policy of the law, which forbids titles from passing by parol and requires the more permanent evidence of writing and sealing. . . . But it is said the party ought to be bound, because the words were inserted by his agent. That is assuming the position in dispute. There might be an agency to receive the money or make the purchase, which would in law be sufficient, when there was not an agency to bind the principal by this form of security. The very question is, whether the person, who wrote out the bond and delivered it was in fact and in law

the agent for that purpose. To determine it, we are obliged to recur to the rule of law which defines what may create an authority to make a deed, and by what evidence that authority may be established. If it cannot legally exist without a deed, then he who had only a verbal authority was not in law an agent for this purpose, though he might have been for others." *Davenport v. Sleight,* 19 N. C., 381. In *Graham v. Holt,* 25 N. C., 300, the Court in an opinion by *Daniel, J.,* again approved the principle: "The notion with us has always been, what we learned from Co. Lit., 52(a), and the Touchstone, 57, that he who executes a deed as agent for another, be it for money or other property, must be armed with an authority under seal. *McKee v. Hicks,* 13 N. C., 379; *Davenport v. Sleight,* 19 N. C., 381. The insertion of the sum in the blank space was intended to consummate the deed; it was done without legal authority, and the instrument is void as a bond." Similar opinions are expressed in many of the later decisions, among them, *Marsh v. Brooks,* 33 N. C., 409; *Bland v. O'Hagan,* 64 N. C., 471; *Barden v. Southerland,* 70 N. C., 528; *Cadell v. Allen,* 99 N. C., 542. In some of these cases the instrument under consideration was a bond and not a deed, but as said by *Battle, J.,* in *Blacknall v. Parish,* 59 N. C., 70, the principle is the same.

The defendant in the case last cited desiring to sell his land prepared a deed purporting to convey the title in fee, but left blanks as to the price and the name of the grantee. He authorized another person to fill the blanks and to deliver the deed when such person found a purchaser. The plaintiff bought the land and the agent filled the blanks and delivered the deed. The court concluded that while the instrument could not operate as a deed it was enforceable as a contract for the conveyance of land and that the plaintiff was entitled to a decree for specific performance. It is clear, then, that the trial judge made no error in signing the judgment appearing of record and in refusing to sign the one tendered by the appellants. True, the rights of the defendants *inter se* are yet undetermined, but no issues were submitted or tendered as to the controversy between them, presumably because the property will be exhausted in payment of the judgments against Wimbish. We find

No error.

NEIL ROSE v. W. W. DEAN.

(Filed 17 November, 1926.)

1. Husband and Wife—Alienation of Wife's Affection—Malice.

In order for a husband to recover damages for the alienation of his wife's affections, where no element of seduction or adultery exists, it is necessary for the plaintiff to prove malice in the sense of unjustifiable conduct of the defendant causing the injury in suit.

2. Same—Evidence—Letters.

A single intercepted letter written by the defendant in an action by the husband for damages for alienating his wife's affection, where immorality between them is not claimed, and malice is necessary to be shown, is insufficient, in the absence of other evidence tending to show unjustifiable conduct on the part of the defendant causing the injury in suit.

APPEAL by defendant from *Lyon, J.*, at March Term, 1926, of SURRY.

W. F. Carter and J. H. Folger for the plaintiff.
Graves & Graves and Walter E. Brock for defendant.

ADAMS, J. This is an action to recover damages for the alienation of the affections of the plaintiff's wife. The defendant offered no evidence, and at the conclusion of the plaintiff's testimony moved to dismiss the action as in case of nonsuit. Upon denial of the motion issues were submitted to the jury and upon the verdict judgment was rendered in favor of the plaintiff. The defendant's motion in our opinion should have been allowed.

The basis of the action is the husband's loss of the society, affection, and assistance of his wife, and if there is no element of seduction or adultery malice must be shown; but "malice" as used here means unjustifiable conduct causing the injury complained of. *Cottle v. Johnson,* 179 N. C., 426.

The plaintiff testified that he married Pearl Newsom in March, 1920, and that one child was born of the marriage; that he moved his family from Mount Airy to Winston-Salem in the spring of 1922; that he worked for the defendant, who was a machinist in a furniture factory; that on 18 March, 1923, the plaintiff, his wife, and the defendant went together in an automobile from Winston-Salem to Mount Airy, all occupying the front seat, the wife between her husband and the defendant. The next day the plaintiff and the defendant returned to Winston-Salem, Mrs. Rose remaining with her mother in Mount Airy. In respone to a telephone call from his brother the plaintiff went back to Mount Airy on the day following, and on his arrival there was informed of a letter written by the defendant to the plaintiff's wife, which, how-

ever, had been delivered to another woman of the same name. For some months afterwards the plaintiff and his wife were separated.

The letter referred to was put in evidence by the plaintiff. A recital of its perfervid inanities is unnecessary, for his wife never received it, and there is no evidence that she had any acquaintance with the defendant until the day the three made the trip from Winston-Salem to Mount Airy or that there had been any other communication between them except possibly a conversation in the presence of her husband or her mother. For want of other evidence the plaintiff relies chiefly on the letter and refers as authority for its competency to 30 C. J., 1143, sec. 1016: "Letters of love and affection written by defendant to the alleged alienated spouse are admissible to show the character of the relation between them and to establish the fact of alienation, even though such letters were intercepted by plaintiff spouse and never reached the alienated spouse." This statement must be considered in the light of the authorities cited in its support. In these cases there was evidence either that the wife had received and answered the defendant's letters (*Mead v. Randall,* 69 N. W., 506); or that a systematic effort had been made by the defendant to alienate the wife's affections by gifts and personal address as well as by letters, the receipt of which was not questioned (*Hartpence v. Rodgers,* 45 S. W., 650); or that the letter was written at the plaintiff's request (*Backman v. Holman,* 159 Pac., 125); or that letters written by the defendant to the wife and intercepted by the husband tended to negative testimony that the defendant was the victim of a conspiracy and to corroborate the wife's testimony that he had tried to win her affections. *Pratt v. Harold,* 190 Pac., 372. In *Mercer v. Parsons,* 112 At., 254, it is intimated that an intercepted letter, if the only evidence, would not be sufficient.

In our case the letter is substantially the only evidence on the question of alienation; it never reached the plaintiff's wife; it is not one of a series of connected circumstances; it is not corroborative; it stands alone and of itself is insufficient.

The motion for nonsuit should have been allowed.

Error.

SECURITY FINANCE CO. v. L. F. McGASKILL.

(Filed 17 November, 1926.)

1. Fraud—Deceit—Allegations—Evidence.

In defense to an action to recover of the defendant upon certain promissory notes upon the ground of fraud in their procurement, it is required that the defendant allege and prove that the representations

were false and relied on to his injury, and procured by the plaintiff with knowledge thereof, or with a reckless disregard of their truth or falsity, and made with fraudulent intent.

2. Same—Contracts—Notes—Written Instruments.

One who signs a promissory note is held to the terms of the written instrument when he can read and understand them, and only relied on the misstatement of the other party because he was too busy with other matters to fully inform himself.

APPEAL by plaintiff from *Nunn, J.*, at July Term, 1926, of RICHMOND.

Civil action to recover on six promissory notes given by the defendant to the Brenard Manufacturing Company for the purchase of three claxtonolos, and alleged to have been assigned to the plaintiff, for value, before maturity, and without notice of any equities, etc.

Upon the jury's finding that said notes were secured from the defendant by means of false and fraudulent representations on the part of the agent of Brenard Manufacturing Company, and that the plaintiff was not a holder in due course of said notes, judgment was rendered in favor of defendant, from which the plaintiff appeals, assigning errors.

W. R. Jones for plaintiff.
Bynum & Henry for defendant.

STACY, C. J. With respect to the defense of fraud in the procurement of the notes sued on, it is nowhere alleged that the false representations, upon which defendant says he relied to his injury, were made with knowledge of their falsity or with reckless disregard of their truth or falsity, nor is it alleged that such false representations were made with intent to deceive the defendant. The allegations, therefore, are insufficient to support the charge of fraud. *Stone v. Milling Co., post,* 585.

Furthermore, it is alleged that the defendant informed the salesman of the Brenard Manufacturing Company "he was too busy at the time to read over the contract, but would rely on the statements made by the agent and sign it, since he had to wait on his customers and could not possibly read the written instrument."

Animadverting on the insufficiency of a similar defense in *Upton v. Tribilcock,* 91 U. S., 45, it was said: "It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract; and, if he will not read

what he signs, he alone is responsible for his omission," citing in support of the position: *Jackson v. Croy,* 12 Johns, 427; *Leis v. Stubbs,* 6 Watts, 48; *Early v. Bryant,* 32 Me., 474; *Coffing v. Taylor,* 16 Ill., 457; *Slafyton v. Scott,* 13 Ves., 427; *Alvanly v. Kinnaid,* 2 Mac. & G., 7; 29 Beav., 490.

To like effect are our own decisions. *Hoggard v. Brown, ante,* 494; *Hollingsworth v. Supreme Council,* 175 N. C., 615, at page 637; *Colt v. Kimball,* 190 N. C., 169, and cases there cited.

The duty to read an instrument, or to have it read, before signing it is a positive one, and the failure to do so, in the absence of any mistake, fraud or oppression, is a circumstance against which no relief may be had, either at law or in equity. *Grace v. Strickland,* 188 N. C., p. 373. There are none so blind as those who have eyes and will not see; none so deaf as those who have ears and will not hear. *Furst v. Merritt,* 190 N. C., p. 402, and cases there cited.

The case of *Bank v. Redwine,* 171 N. C., 559, strongly relied on by the defendant, is not at variance with this position, but is in support of it. Likewise, the cases of *Oil and Grease Co. v. Averett, ante,* 465; *Bell v. Harrison,* 179 N. C., 190, *Machine Co. v. McKay,* 161 N. C., 584, *Leonard v. Power Co.,* 155 N. C., 10, and *Walsh v. Hall,* 66 N. C., 233, cited by the defendant, fall in the same category.

There was error in submitting the issue of fraud to the jury, as the answer contains no sufficient allegation to support it.

New trial.

STATE v. PAUL TYNDALL AND TOM HOWARD.

(Filed 17 November, 1926.)

Forcible Trespass—Peaceful Entry Upon Lands — Abusive Language—Aider and Abettor.

Where there is evidence that the defendant on trial for forcible trespass entered peacefully into the store of the prosecuting witness, and thereafter violently cursed him without provocation, and acted so as to reasonably intimidate the prosecutor or lead to a breach of the peace, the conduct of the defendant within the store is a forcible trespass sufficient to sustain the charge in the indictment, and an aider and abettor who entered with him and standing by, by his presence and conduct abetted him, is likewise liable for the offense.

APPEAL by defendant, Paul Tyndall, from *Devin, J.,* at August Term, 1926, of LENOIR.

STATE *v.* TYNDALL.

Criminal prosecution tried upon an indictment charging the defendants, Tom Howard and Paul Tyndall (1) with forcible trespass, and (2), with forcible detainer.

On 28 December, 1925, the first Monday after Christmas, the two defendants went to the store of the prosecuting witness, Ed. Jones, with the avowed purpose, so expressed by Howard, but not by Tyndall, of "settling" with Jones for "turning up" a whiskey still, or reporting it to the officers. Both defendants were drinking, and Tyndall had a shotgun, but he at no time offered to use the gun. After buying some ginger pop for both of them, and while they were drinking it, Howard accused Jones of having reported the presence of a still in the neighborhood to the officers. This was denied by Jones, whereupon Howard began to curse Jones, using profanity and calling him a "G-d-liar." Jones protested and called his wife, who was at their home near by, to disprove the allegation. Howard continued his cursing and, after Mrs. Jones arrived, said that if Jones didn't report it, his wife did. Upon similar denial being made by Mrs. Jones, the defendant, Howard, cursed her, using the same language he had previously addressed to her husband. Both vigorously denied the charge. Mrs. Jones asked the defendants to leave the store. They did so, but as she closed the door behind them, Howard went around the store and came back in through another door. He continued to curse the prosecuting witness for several moments. After some considerable length of time, Howard left, saying that he was going to get a witness to prove that either Jones or his wife reported the still to the officers. Tyndall remained several minutes, waiting for Howard to return with his witness, but he never came back. Mrs. Jones then asked the defendant Tyndall to leave. He wanted to know what for, stating that he had done nothing, but wished to make a purchase from the store, and tried to pay her a bill which he owed; she declined to take the money and insisted that he leave, which he did.

From an adverse verdict against both of the defendants, and judgment pronounced thereon, the defendant, Paul Tyndall, appeals.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Shaw, Jones & Jones for defendant.

STACY, C. J., after stating the case: While there may be some slight contrariety of expression in the decisions as to whether a forcible trespass may be committed where the entry is peaceable *(S. v. Laney,* 87 N. C., 535), nevertheless it seems to be settled by the later cases that,

although an entry on lands may be effected peaceably and even with the permission of the owner, yet if, after going upon the premises of another, the defendant uses violent and abusive language and commits acts such as are reasonably calculated to intimidate or lead to a breach of the peace, he would be guilty of a forcible trespass, for "It may be, he was not at first a trespasser, but he became such as soon as he put himself in forcible opposition to the prosecutor." *S. v. Wilson,* 94 N. C., 839; *S. v. Talbot,* 97 N. C., 494; *S. v. Gray,* 109 N. C., 790; *S. v. Tuttle,* 145 N. C., 487; *S. v. Davenport,* 156 N. C., 596; *S. v. Oxendine,* 187 N. C., 658.

Under the decisions, we think it is clear that Howard's conduct amounted to a forcible trespass. Tyndall was also present, with a show of force, or, at least, he was aiding and abetting Howard in what he did. This rendered him guilty too. *S. v. Skeen,* 182 N. C., 844. If two persons aid and abet each other in the commission of a crime, both being present, both are principals and equally guilty. *S. v. Hart,* 186 N. C., 582; *S. v. Jarrell,* 141 N. C., 722.

No error.

T. O. JOHNSON ET AL., ON BEHALF OF THEMSELVES, AND OF SUCH OTHER CITIZENS AND TAXPAYERS OF WAKE COUNTY AS MAY MAKE THEMSELVES PARTIES TO THIS ACTION, v. THE BOARD OF COMMISSIONERS OF WAKE COUNTY, THE STATE HIGHWAY COMMISSION ET AL.

(Filed 17 November, 1926.)

1. State Highway Commission—Discretionary Powers—Courts — Change of Route—Statutes—Highways—Injunction.

Where the State Highway Commission has taken over a certain public road within a county, as a link in the State system of public highways, and the county in which it is situate has contracted to loan the State Commission a certain amount of money to be expended on its improvement, subject to the approval of the voters in issuing bonds for the purpose, and there is nothing in the contract that would require the route of the existing road to continue as it then was laid out: *Held,* the discretionary power vested in the State Highway Commission as to changing the route, vesting in them by statute, will not be interfered with by the courts, at the suit of the taxpayers residing in a corporated or unincorporated town, contending that they would not have voted for the bond issue except upon representation made to them that the then existing route would not be changed. As to whether an unincorporated town is a "principal town" within the meaning of the statute. Quære?

2. Same—Contracts — Agreements Made Beforehand as to Exercise of Discretionary Powers.

The State Highway Commission, neither by contract nor otherwise, can be controlled beforehand in the exercise of its discretion, conferred on it by statute, as to the change of location of a public highway.

CLARKSON, J., concurring in result.

APPEAL by defendants from order of *Bond, J.*, dated 15 September, 1926, continuing to the final hearing a temporary restraining order theretofore issued in this action. From WAKE. Reversed.

Action to enjoin and to restrain perpetually defendants from expending certain funds in the construction of Route 21, of the State highway system, unless same shall be constructed as located prior to and at the time of an election held in Wake County, on 20 October, 1925. Said funds are the proceeds of the sale of bonds issued by the board of commissioners of Wake County, pursuant to such election, and were loaned, or are to be loaned, by said board to the State Highway Commission under the provisions of a written contract between said board and said commission, dated 4 August, 1925.

Plaintiffs allege that Route 21 had been located prior to said election by the State Highway Commission so as to approach the town of Varina, in Wake County, from the north, and to pass into and through said town, and thence in a southerly direction to the Harnett County line; that in order to provide funds to be loaned to said highway commission by the board of commissioners of Wake County, for the construction of said Route 21, and of other routes included in the State highway system, in Wake County, an election was called by said board to determine whether or not bonds should be issued by the board for that purpose; that prior to said election, it was represented to plaintiffs and to other citizens and voters of Wake County, that if said election should result favorably to the issuance of said bonds, Route 21, as then located, would be constructed by the State Highway Commission and paid for out of funds loaned to said commission by the board of commissioners of Wake County derived from the sale of said bonds; that relying upon said representations, plaintiffs and others voted for the issuance of said bonds, and that but for such representations they would not have so voted; that since the said election, resulting in favor of the issuance of said bonds, and since the sale of the same, the State Highway Commission has changed the location of Route 21, and is now constructing the said route upon a location which does not approach the town of Varina from the north, and does not pass into and through said town, and thence to the Harnett County line; that by reason of the change in the location of Route 21, and of the expenditure of funds

derived from the sale of said bonds in the construction of said route otherwise than as located at the time of said election, defendants are wrongfully diverting said funds from the purpose for which said bonds were authorized by the voters of Wake County.

Defendants deny that representations as alleged in their complaint were made to plaintiffs, with respect to the location of Route 21; they expressly deny that defendants, or either of them, made or authorized others to make such representations; they allege that said bonds were authorized by the voters of Wake County by an election called by the board of commissioners of said county, pursuant to a petition filed according to law with said board, and that the proceeds of said bonds have been loaned to the State Highway Commission pursuant to a written contract, between said board and said commission, dated 4 August, 1925; and that the fund derived from the sale of said bonds has been and will be expended by defendants in accordance with said contract, and as authorized by the voters of Wake County, at said election.

Defendants further deny that Route 21, extending from Raleigh south to the Harnett County line, was located by the State Highway Commission, or otherwise, prior to or at the time of said election, as plaintiffs allege, and aver, on the contrary, that while preliminary surveys were made under the direction of the commission, and rights of way secured, for the location of said Route 21, prior to said election, as alleged in the complaint, location of said route was not finally determined by said commission, until the funds for its construction were in hand or available; and that said highway commission now proposes to construct, and was engaged in the construction of, said Route 21, until restrained by the temporary order issued herein, as finally located by said highway commission in the exercise of the discretion vested in said commission by law.

Upon the hearing of the order to show cause why the temporary restraining order should not be continued to the final hearing, Judge Bond was of the opinion that defendants had failed to show such cause, and thereupon signed an order denying defendants' motion to dissolve said temporary restraining order, and continuing same to the final hearing, in order that issues of fact, arising upon the pleadings, might be submitted to and passed upon by a jury. From this order defendants appealed to the Supreme Court.

J. R. Baggett, Brantly Womble and R. N. Simms for plaintiffs.

Attorney-General Brummitt and Assistant Attorney-General Ross for State Highway Commission.

Percy J. Olive for Board of Commissioners of Wake County.

CONNOR, J. Prior to 4 August, 1925, the State Highway Commission, pursuant to the provisions of chapter 2, Public Laws of 1921, had designated, taken over and assumed control of certain roads or highways in Wake County as parts of or links in the system of State highways, as proposed by said commission, acting under the authority of said statute. The said commission had been unable theretofore to construct said roads or highways, because sufficient funds for that purpose had not been available prior to said date.

On said date an agreement was entered into between the board of commissioners of Wake County and the State Highway Commission, by which said board agreed to advance said commission a fixed sum of money, to be used in the construction of said roads, provided the voters of Wake County, at an election to be held thereafter, should approve the issuance of bonds required for raising said sum. The highway commission obligated itself to repay such sums as might be advanced under this agreement out of any funds which should thereafter come into its hands, allocated for construction of the State highway system in Wake County.

Thereafter, on 20 October, 1925, an election was held, and the issuance of said bonds approved by a majority of the voters of the county. These bonds have been issued and sold by the board, and the proceeds loaned to the commission, pursuant to the agreement, which is valid, and authorized by statute. *Young v. Highway Commission*, 190 N. C., 52; *Lassiter v. Comrs.*, 188 N. C., 379.

Among the roads in Wake County theretofore taken over by the State Highway Commission, as parts of or links in the State highway system, was the road extending from Raleigh south to the Harnett County line. This road constituted a part of or a link in Route 21, of said system. It is shown on the map, which was attached to and formed a part of the bill enacted by the General Assembly as chapter 2, Public Laws 1921. The word "Varina" appears on said map, indicating, as plaintiffs contend, the approximate location of a town of that name on said road. It is conceded that at the time of the enactment of said bill no incorporated town of that name was located on said road. There is uncontradicted evidence on this record that there was then and is now a community located on said road, as it existed at the time the statute was enacted, known and designated for many purposes as the "Town of Varina"; said community maintains a railroad station, a post office, a bank, a hotel, about twenty stores, markets for the sale of cotton, tobacco and other farm products, and residences for a prosperous and thrifty population. It is the trading and marketing center for a prosperous agricultural section, including portions of several counties. A part of the territory occupied by said community is included within the

corporate limits of the town of Fuquay Springs, which was incorporated by chapter 167, Private Laws of 1915; a large part of the business and residential sections of said community, however, is outside the said corporate limits. It does not appear that there are any fixed or definite limits to or boundaries of the territory occupied by said community.

Plaintiffs contend that said "Town of Varina," although not incorporated as a town, is a "principal town," within the meaning of the proviso in section 7, ch. 2, Public Laws 1921, and that therefore it cannot be disconnected from the State highway system by the exercise of the admitted power of the State Highway Commission, subject to the proviso, to change, alter, add to or discontinue the roads shown on the map, as constituting the State highway system, proposed by the General Assembly. It does not appear upon this record that any map, showing the roads in Wake County, comprising links in the State highway system, as proposed by the State Highway Commission, in accordance with the provisions of the statute, was ever posted at the courthouse door in said county. Nor is there evidence that said highway commission had made a final decision under the provisions of the statute as to the location of the road, extending from Raleigh south to the Harnett County line, prior to the date of the election on 20 October, 1925. It is not necessary for us now to decide the interesting question presented by plaintiff's contention, whether incorporation is a requisite of a "principal town," as that term is used in the provision in section 7, ch. 2, Public Laws 1921. Upon the facts appearing on this record, we must hold that the State Highway Commission, not having theretofore finally decided upon the location of Route 21, had the power conferred by statute to change the road extending from Raleigh south to the Harnett County line, and to adopt a new location for said road, as a part of or a link in Route 21; such power is not affected by the fact that the word "Varina" appears on the map, for whether Varina is a principal town or not, it appears that Route 21, as now located, passes within 300 feet of the railroad station in said town. It cannot be held as a matter of law that upon the admitted facts, Varina has been disconnected from or deprived of the service of the State highway system. No question or issue of fact involved in the decision of the highway commission with respect to the location of Route 21 is raised by the pleadings requiring that it be submitted to or passed upon by a jury; whether the highway commission had the power to change the location of the road, presents a question of law only, to be determined by the Court. We are of the opinion that the highway commission had such power, and that upon the facts alleged in the complaint its exercise of such power is not subject to judicial review.

The decision of this Court in *Newton v. Highway Commission, ante,* 54, has no application to this case. The opinion written by *Brogden, J.,* in that case is not an authority for holding that upon the facts of this case the highway commission was without power to locate Route 21, as it has done since the date of the election. Nor is the decision in *Cameron v. Highway Commission,* 188 N. C., 84, necessarily determinative of the question here presented.

The validity of the bonds issued and sold by the board of commissioners of Wake County, in order to provide funds to be loaned by said board to the State Highway Commission, to enable said commission to build, immediately, and without waiting for funds from the State, portions of or links in the system of State highways, located in Wake County, is not questioned by plaintiffs in this case. They contend that by reason of representations made to them and to other voters of Wake County, with reference to the location of Route 21, the State Highway Commission has no power to abandon the location of said route, which they allege was made prior to the election, and to adopt another location, which does not approach Varina from the north, or pass into and through Varina, or to use the funds loaned to it by the board of commissioners to construct the route upon the new location. They do not allege that the board of commissioners or the highway commission made the representations with respect to the location of said route, upon which they allege they relied, in voting for the issuance of said bonds; they allege that said representations were made by a member of the commission, acting in his individual and not in his official capacity, and by advocates of the issuance of the bonds. No evidence was offered at the hearing that such representations were made by either the board or the commission, or that they were authorized or ratified by either.

Neither the board nor the commission can be controlled or affected, as to the manner in which they shall exercise their discretion with respect to the expenditure of the proceeds of said bonds, or with respect to the location of roads to be constructed and paid for out of funds derived from the sale of said bonds, by representations of an individual member of the State Highway Commission made prior to the date of the agreement between the board and the commission or by the representations of advocates of the issuance of said bonds, made during the campaign preceding the election, as to the location of roads to be constructed thereafter by the highway commission and paid for out of advancements to be made to said commission by the board of commissioners of Wake County.

Defendants deny that representations were made, as alleged in the complaint; no issue of fact, however, is thereby raised, which would be determinative of the rights of the parties to this action. If it should

be found by a jury, upon proper allegations in the complaint, supported by competent evidence, that both the board and the highway commission had, prior to the election, not only represented to plaintiffs that they would but had, further, each acting in its corporate capacity, for a valuable consideration, received by said board or said commission for sole benefit of the public, agreed to construct said Route 21, upon a fixed and definite location, such finding would not support a judgment or decree giving to plaintiffs relief as demanded or prayed for in their complaint. Such an agreement would be void, and unenforceable by the courts, as against public policy. Neither the board nor the commission can absolve itself from its duty, or deprive itself of its right, to exercise discretion vested in each by law in the performance of a public duty, when called upon to perform such duty, by representations made or agreements or contracts entered into, with respect to the manner in which it will then act. Each is required to retain its freedom of judgment at all times, up to and including the very moment when it is called upon to act, so that its decisions when finally made will be influenced then only by a regard for the public welfare. *Edwards v. Goldsboro,* 141 N. C., 60.

An agreement or contract made by individuals with public officials for the purpose of influencing the exercise of discretion vested in them by law, as to the manner in which they shall perform public duties, although the consideration for such agreement or contract enures to the benefit of the public, is void as against public policy. Such officials cannot bind themselves by such agreements or contracts, nor can they be held bound by the courts. This well-settled principle certainly precludes the courts from rendering any judgment or decree in favor of plaintiffs in this case, who do not allege that there was any agreement, or contract with defendants, upon which they seek relief. It is not even alleged that the representations were made by defendants.

We are of the opinion that there was error in denying defendants' motion that the temporary restraining order be dissolved and in continuing the said order to the final hearing. There are no issues of fact to be submitted to or passed upon by a jury. The temporary restraining order should be dissolved. It is so ordered.

Reversed.

CLARKSON, J., concurring in the result: The State Road Act, Public Laws 1921, ch. 2, for so large an undertaking, is remarkably clear. The caption shows its purpose: "An act to provide for the construction and maintenance of a State system of hard-surfaced and other dependable roads connecting by the most practicable routes the various county-seats and other principal towns of every county in the State for the

development of agriculture, commercial and industrial interests of the State, and to secure benefits of Federal Aid therefor, and for other purposes."

The primary purpose was to take care of and foster the *agricultural, commercial and industrial* interest of the State. This was the service. The setting: In the different counties in the State at the time the State Highway Act was passed, the road-governing bodies of the counties had charge and control of the roads. Federal Aid had been expended on some of them. The county roads, to become part of the State system, the Legislature in its judgment and wisdom set forth in explicit language how they were to be taken over—with notice to the road governing bodies in the 100 counties of the State and a hearing, and in case of any objection, the hearing to be before the full commission, an appellate court as it were. The Legislature, as its agents, provided for ten highway commissioners, an administrative body, to carry out its will and mandate, giving this highway commission fixed, certain and limited powers. The largest appropriation ever made in the history of the State was made and this enormous sum to be spent on roads was not left to a commission of ten, no matter how capable, efficient and honest they may be, without limitations. The mandate of the Legislature was the building of a fixed system, mapped by it for the commission. The Legislature the creator, the commission the agency. "The terms of the proviso are positive and mandatory and not uncertain or discretionary." *Adams, J.*, in *Cameron v. Highway Commission*, 188 N. C., at p. 88. The whole history of the State heretofore was contrary to unlimited or arbitrary power. A map was attached to the act. It showed the 100 county-seats and marked on the map were the names of each county-seat, without calling it a county-seat. Also about 176 other places named on the map and the roads as shown on the map went through the county-seats and the other places named, as set forth on the map. The general purpose as set forth in the act, was for the State to lay out, take over, establish and construct and assume control of approximately 5,500 miles of hard-surfaced and other dependable highways running *to all county-seats and to all principal towns, State parks and principal State institutions,* etc., with *special view* of development of *agriculture, commercial and natural resources* of the State; further purpose of permitting the State to assume control of the State highway, repair, construct and reconstruct and maintain them at the expense of the State and relieve the counties, cities and towns of the State of this burden. The intent was to *establish and maintain* a State system to be hard-surfaced as rapidly as possible, *of durable hard-surfaced, all-weather roads connecting the various county-seats, principal towns and cities.*

The designation of all roads comprising the State highway system as proposed by the commission shall be mapped. A map showing the proposed roads to constitute the State highway system *"is hereto attached to this bill and made a part thereof."*

In taking over the roads (1) there shall be posted at the courthouse door in every county in the State, a map of all the roads in such county in the State system; (2) the board of county commissioners or county road-governing body of each county or street-governing body of each city or town of the State shall be notified of the *routes that are to be selected and made a part of the State system of highways.* (3) If no objection is made by the road-governing bodies above mentioned in sixty days after notification, *then and in that case the said roads or streets to which no objection is made shall be and constitute links or parts of the State highway system.* (4) If objections are made, then the whole matter shall be heard and determined by the State Highway Commission in session, under rules and regulations as may be laid down by them, but notice to be given by them of time and place of hearing (a) at the courthouse door, (b) newspaper published in the county, at least ten days prior to the hearing and the decisions of the State Highway Commission shall be final.

Under the system, the bond money is equitably distributed all over the State. The State was divided into nine construction districts with nine highway commissioners—one from each district, and a chairman who heads the commission. The bond money is distributed as follows: The area of land in a particular district to the total area of land in the State, the mileage of State roads in the district to the total mileage of roads taken over in the State and the population in the district to the population in the entire State. By this method each district has its equitable and proportionate part of the funds spent in the district, with no favoritism to any section of the State. The State as a unit was the goal in building the State system. The bill gives "equal rights to all and special privileges to none." The butter is spread all over the bread. The automobile and gasoline tax carries the entire burden of the system. To finance this system, the acts provide for the issuance of special bonds of the State, payable in not less than ten nor more than forty years from the date of issue—one-thirtieth paid each year—a broad building and loan plan.

The gist of the controversy is: "A map showing the proposed roads to constitute the State highway system is hereto attached to this bill and made a part thereof. The roads so shown can be changed, altered, added to or discontinued by the State Highway Commission: *Provided, no roads shall be changed, altered or discontinued so as to disconnect*

county-seats, principal towns, State or National parks or forest reserves, principal State institutions and highway systems of other States."

It was set forth in the act that within sixty days after its ratification, the State Highway Commission shall commence to assume control and complete the assumption of control of all the roads which constitute the State highway system as rapidly as practicable. Then the powers are given in the act.

The Legislature, responsible to their constituents, took no chances. They had a map, naming the cities and towns on the map, and the roads are shown on the map going through these objectives, and that map was made a part of the act.

It was explicitly provided how the State system of roads would be taken over and when so done the proviso was clear: *"No roads shall be changed, altered or discontinued so as to disconnect county-seats, principal towns,"* etc. Then provision is made between these objectives, the highway commission "with full power to widen, relocate, change or alter the grade or location thereof." This was to avoid railroad crossings and make better grades in reference to the topography of the country, etc., between the fixed objectives—county-seats and principal towns named on the map. If all the towns put on the map, incorporated or not, were not considered principal towns in the State system, or only incorporated towns were intended, how easy to have said so. Why would the map show the roads through the towns marked on the map, with no mention whether they were incorporated or not, if they were not principal towns?

In the present action, it appears that prior to the selection, the State Highway Commission had caused a survey of the *red route* to be made and had obtained rights of way for the said highway along said *red route*. The highway commission had not at the time made any other survey for the said highway location. And by the affidavits of about one hundred and sixty citizens in said territory, filed in this case, these allegations are supported, and it is set forth that it was represented to the affiants and generally to the people of the southern section of Wake County, that if the money was raised by the bond issue to build said highway, it would be constructed along the *red route*, and *to* and *through* the *town of Varina*. And further that these representations were what caused the election to be carried, the same having been won by a narrow margin.

The reasonable and righteous construction of the act is that every county-seat and town marked on the map which the State highway ran through was a principal town—there were perhaps hundreds of others not marked on the map. Those that were marked, incorporated or not, were under this act the principal towns with the roads going through

them, and when taken over *could not be disconnected*. Perhaps, with a few exceptions, the roads mapped have been taken over and for years maintained by the State. The senator from Robeson County, who was the leader in the Senate in putting over this road program, said before this Court that the road bill would not have received a half dozen votes under any other construction except as herein given. If the people of the State in the hundred counties and in the towns marked on the map had any idea that their agency, the highway commission, could destroy these objectives—the county-seats and towns marked on the map—the more positive limitation on the power would be quickly felt. The people under our form of government are the sovereign. Powers that are not delegated to the United States or prohibited to the states or limited by the State Constitution, are in the people. In the present action, unfortunately for plaintiff, the record does not show that the road going through *Varina* to Lillington, though mapped through same, was ever taken over as part of the State system and maintained. Whose fault this is, the record does not disclose. It should have been done and the matter determined when the State roads were taken over. Not being done, the proviso in regard to disconnecting cannot apply. "What the statute hath joined together, the defendant cannot put asunder." *Brogden, J.*, in *Newton v. Highway Commission, ante*, p. 63. *Varina*, for some reason although shown on the map, was not joined to the State system. It was entitled to the ceremony, but it was never performed. The board of county commissioners, the road-governing body, now have the power which has never been exercised, so far as the record discloses, to demand that the road run through Varina, in accordance with the statute. The first contention of the plaintiff cannot be sustained from the record.

The next position taken is set forth in plaintiffs' brief: Plaintiffs contend that "contention was made in the lower court by the counsel of the defendants that they 'could not barter away their discretionary power' nor be bound by 'pre-election promises.' Our reply to this is that the law gives them no discretion as to how they will use money which they may receive impressed with the trust that it shall be used for a specific route and purpose. . . . It is a rather pitiful performance, any way, for a public official, or public officials, to seek to justify their action on the ground that they are not bound by 'pre-election promises.' A promise ought to be carried out, and a wholesome policy demands that even platforms shall bind the candidates that stand for election upon them. Surely the defendants' counsel will not insist that they should not keep faith with the folks." "A major question in this case relates to an alleged diversion of the fund. The aid of a court of equity is sought to prevent such alleged diversion."

This is good morals, and in a similar case of *Newton v. School Committee,* 158 N. C., at p. 188 (1912), the writer of this concurring opinion tried to impress this view on this Court and make it the law, but to no avail. It was there decided, and since reiterated in numerous decisions: "Courts may not interfere with discretionary powers conferred on these local administrative boards for the public welfare unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion." *School Committee v. Board of Education,* 186 N. C., p. 643.

These decisions are binding and have become the fixed law of this jurisdiction. There is no question but that the citizens in the town of Varina and community, in good faith, thought the road was going through Varina, as contemplated by the State map, from Raleigh to Lillington, and from the promises made by eminent individuals in an open letter interested in the bond issue:

"*Vote Tuesday, 20 October*
for
Good Roads and for the Progress of Raleigh and Wake County.

An open letter to all registered voters:

Remember the election 20 October. It is for you to say on that day how the next $1,300,000 justly apportionable to Wake County shall be expended.

For

If you vote for the proposition, you vote for the construction at once of the following hard-surfaced roads:

1. From Cary to the Chatham County line via New Hill.

2. *From Raleigh to the Harnett County line via Varina and Fuquay Springs.* (Italics mine.)

3. Connecting link between routes 90 and 91 at some convenient point in Little River Township, greatly benefiting both Wendell and Zebulon and that section of the county.

A vote for the proposition means the building of these roads *at once. Again, if you vote for the proposition,* you determine once and for all how the next $1,300,000 justly apportionable to Wake County shall be applied. The matter is signed and sealed in a contract between the highway commission and the county board of commissioners of this county. All that is required is the ratification of the voters 20 October. . . .

Go to your precinct on Tuesday, 20 October, and vote early."

(2) The agreement for the advance of funds to hard surface certain roads in Wake County, made by the board of commissioners of Wake

County, and the State Highway Commission (by authority of *Young v. Highway Commissioners*, 190 N. C., p. 52) before the bond issue of $1,300,000 was voted, the contract designates the roads to be built as follows: "A portion of Route 50, extending from Cary south to the Chatham County line; a portion of Route 21, *extending from Raleigh south to the Harnett County line;* and a portion of Route 91 extending from some point on Route 90, hereafter to be determined, to the Wake County line." The contract made with the State Highway Commission states that it was not binding on the board of commissioners until authorized by vote of the people to issue said bonds. The people voted under an open letter to *all registered voters* of the county —the road to go through *Varina*. This, no doubt, was well known to all the officials connected with this transaction. The open letter said it was *"signed and sealed"* in a contract with the highway commission and board of county commissioners.

A resolution of the board of county commissioners of Wake County, 30 December, 1925, is as follows: "In the matter of the location of Route 21, running south from Raleigh to the county line, it was, on motion made by Commissioner Bennett, ordered that the board of commissioners of the county of Wake leave the location of said Route 21 entirely to the better judgment of the State Highway Commission, and the board will approve whatever location (is) adopted by the State Highway Commission." This resolution was affirmed on 16 February, 1926.

On 6 July, 1926, the minutes are as follows: "On motion made by Commissioner Wiggs, and duly seconded by Commissioner Bennett, the following resolution was adopted: 'Whereas, it appears from the reports of the engineering department of the State Highway Commission, and by reports of Prof. Harry Tucker, of the department of highway engineering of the State College, that the line as surveyed for Route 21 from Raleigh to Varina will cost approximately the sum of $50,000 to $60,000 less than any other survey presented on the map of the location of said Route 21, and eliminates all grade crossings, and serves an equally prosperous and thickly settled community of Wake County, and gives practically one-half mile shorter route from Raleigh to Varina.' Be it resolved by the board of commissioners of the county of Wake, if the statements and estimates be proven to be correct, we favor the adoption of the red line route for Route 21 to Varina."

From the record, Prof. Harry W. Tucker shows that 47/100 of a mile would be saved by going through Varina on the red route, as originally marked out, etc., and about $36,000.

On 21 July, 1926, the minutes were as follows: "On motion made by Commissioner Ray, and duly seconded by Commissioner Bennett, the

following resolution was unanimously adopted: 'In view of the fact that a large number of citizens of Southern Wake are petitioning the board with reference to the part of Route 21 designated as project 480: Resolved, that the board of commissioners of Wake County request a conference at the earliest possible moment with the chairman of said commission and the commissioner from this district; and, Resolved further, that said commission be and is requested to hold up further expenditures of funds on this project until said conference be had.' The clerk and the attorney are instructed to arrange for the conference as early as possible, at a time and place to suit the said chairman and members of the highway commission."

(3) The open letter to the voters of Wake County was signed by fourteen of the most distinguished business and professional men of Raleigh. The voters in the county were notified from this open letter the road was to *go through Varina*—it said so—and no doubt voted bonds with that knowledge. The board of county commissioners have not as yet entirely crossed the Rubicon. They still can require the road to go through Varina. The record shows that promises were made in an open letter signed by men whose word in every-day life is their bond, before the vote was taken, by prominent high-minded citizens, that the road would go through Varina. The citizens of Varina and community relied on them, and it is alleged that enough votes were cast relying on the pledge of the distinguished citizens and others, with authority, to change the election. The record shows that the *red route* was surveyed and staked out going through Varina, and rights of way were obtained *before the election.* The affidavits are many and similar to J. R. Suggs', who says in part: "It was represented to said petitioners and, as affiant is informed and believes, and understood and depended upon by practically all the persons who signed said petition that the said highway would be run along said surveyed route, which has since become known as the red star; and affiant says that during the campaign preceding the election called by the said commissioners to vote on said bond issue in pursuance of said petitions, it was uniformly at all times and everywhere represented to the people and understood and acted upon by them that the said bonds if voted would be spent to construct the said highway along the said route so surveyed. Affiant further says that he verily believes that if it had been represented to the people that the said highway would be builded along the old route, or which has since become known as the yellow route, the said election for said bonds could not have been carried and would not have been." It is contended by plaintiffs that the yellow route was an after-thought and camouflage, and started after the election and does not run through

the town of Varina. "Running to a county-seat is quite different from running around a county-seat." *Brogden, J.*, in *Newton's case, supra.*

I have written solely from the record in this case. Contracts are not "scraps of paper." Belgium maintained her neutrality and her honor at the expense and sacrifice of an enormous part of her human and material strength.

The plaintiffs say: "This is almost one of life and death with them. Their interests are being passed upon for all time. If they receive not this highway, which they claim and understood was promised to them, then they have no chance through the long years of the future to have a highway by their homes, for by no reasonable probability will another highway ever be builded that close to and nearly parallel to the one builded, if it shall be builded, along the yellow route."

In the case of *Cameron v. Highway Commission,* 188 N. C., p. 99, the writer of this concurring opinion said, and now repeats: "In my opinion neither this Court nor the State Highway Commission have the power to depart from the mandate of the Legislature and wipe from the road system of the State a road mapped *as going through Stem* (named on the map), taken over under the State act, kept up by the State, and make an entirely new road and hard surface it at the cost of about $1,000,000. If it can be done in this case, it can be done anywhere in the State, and a great act may become a "football" between contending factions. Such was not the legislative purpose. *The map and principal towns named on it were an orderly system and if followed will make for peace."*

In a radius of about thirty miles of the capital, we have had bitter controversies by not following the legislative map, treating it as a "scrap of paper." The controversy over the Milburnie and Pool route, the change contemplated wiping out the Milburnie road on the map. The case came here on the power of the board of commissioners to aid the State. *Lassiter v. Comrs.,* 188 N. C., p. 379. The *Cameron case,* where $1,000,000 was involved changing the road mapped through Stem; contrary to engineering advice, and making a new road paralleling the old road three to ten miles going through Creedmoor, the old road taken over under the map and maintained by the State Highway Commission for years. Now the present action with the Varina section of Wake County, feeling a moral and legal wrong has been done them.

When Lord Belhaven thought the rights of the people of Scotland were about to be sunk in the Treaty with England, concluding his wonderful classic oration, he said: "My God! What? Is this an entire surrender? My lord, I find my heart so full of grief and indignation, that I must beg pardon not to finish the last part of my discourse, but pause that I may drop a tear as the prelude to so sad a story."

From the record, Varina is remarkable for a town of its size, getting its life principally from agriculture—cotton and tobacco. The evidence, undisputed, as to Varina: The town has been in existence twenty-five years. At the junction of the main line of the Norfolk Southern and the Durham & Southern Railroads. A union station has been built by the railroads. It is the only cotton market in the southern section of Wake County and the leading tobacco market, drawing trade from the counties of Harnett, Lee, Moore, Hoke, Cumberland and Chatham. In 1925 it had the highest price tobacco market in the world, and the volume handled was 5,000,000 pounds. There are about twenty regularly scheduled trains a day passing through and stopping at the town. Annually about 500 cars of freight are handled. It has twenty stores, one bank, a handsome new bank building is now under construction, and three new brick stores. The Standard Oil Company maintains a distributing point for the southern section of Wake and Harnett counties there. More business has been regularly done in Varina than at any place in Wake County south of the city of Raleigh, and at any place between the city of Raleigh and the city of Fayetteville; yet it appears by the record that Harnett County petitioned the State Highway Commission to go the "yellow route" that cuts off Varina; yet it is Wake County money being expended, that Harnett County is trying to control, which shows the wisdom of the legislative map being followed.

It was the idea from the start to finish in the State road bill to take care of these small towns—agricultural towns supported by crops, mill towns, to encourage textile industry and other little commercial centers, to encourage the various industries of the State. Forty-seven of Varina's citizens are parties to this controversy and hundreds of others, fighting for the life of this splendid country town. Who will it hurt to go through it? From the record, I hope somehow or somewhere the Golden Rule may prevail: "Whatsoever ye would that men should do to you, do ye even so to them." No patriot would want his town destroyed, and seemingly from the record, without cause and in breach of promise made. It is contended by defendant highway commission that "selfish motives" actuated the plaintiffs. I quote the law of self-preservation from the Scriptures: "And if any provide not for his own, and especially for those of his own house, he hath denied the faith, and is worse than an infidel." 1 Tim., 5:8.

The board of county commissioners of Wake, the local body, has not surrendered as yet, as appears from the record. It knows the promise of eminent citizens, in their open letter. It has the power and the money raised to build the road. It is with them. So far we cannot hold on the record that they have violated any provision of law or

abused their sound discretion, or are influenced by improper motives or there is any misconduct on their part. By the last resolution, they seem to want the road to go through Varina, as promised by the eminent citizens. It is about one-half mile shorter and will save $36,000, so says an efficient civil engineer. It is with the board of county commissioners representing the taxpayers. It is the county's money; they are the guardians. The second contention of plaintiffs cannot be sustained.

I concur in the result of *Mr. Justice Connor's* opinion.

WINSTON BRICK MANUFACTURING COMPANY v. GEORGE D. HODGINS AND EFFIE HODGINS.

(Filed 17 November, 1926.)

1. Roads and Highways—Cartways—Ways of Necessity—Deeds and Conveyances.

Where a conveyance of lands provides for an outlet or way of necessity to a public road, to be designated, the grantor has the right of locating it, and upon his failure to do so, this right in proper instances may be exercised by the grantee, but the grantee may not successfully claim that a private road belonging to a third person, and existent at the time, should be continued, there being nothing in the deed, covenant or contract that would uphold this view. Ways of convenience distinguished.

2. Same—Questions of Law—Issues—Questions for Jury.

Where a deed to lands provides for a roadway, or way of necessity, over the grantor's land, the interpretation thereof is one of law, and presents no issue for the jury to determine.

3. Appeal and Error—Review—Trial—Record—Pleadings—Evidence.

On appeal, the Supreme Court will review the case upon the theory that it was tried in the Superior Court as disclosed by the complaint and evidence of record.

CIVIL ACTION, before *Raper, J.*, at February Term, 1926, of FORSYTH.

On 2 February, 1923, the defendants conveyed to the plaintiff six acres of land. The defendants owned other land extending from the tract sold plaintiff, northward to the right of way of the N. & W. R. R. The deed from defendants to plaintiff contained this clause: "This property will have a road platted to Walkertown or paved highway." The Walkertown or paved highway referred to is north of the right of way of the N. & W. R. R. Hence the defendants owned land between the plaintiff's land and the south side of the right of way of

the N. & W. R. R., and therefore in order to reach Walkertown or paved highway, it would be necessary for him to cross defendants' land and the southern right of way of the railroad, the railroad itself, and the northern right of way of the railroad. The defendant platted a street called Garden Street from the plaintiff's land northward to the right of way of the railroad, which street was laid out across the entire property owned by the defendants, between plaintiff's land and the railroad right of way. It was contended by the plaintiff that there was an old road known as Jefferson Street and parallel with Garden Street and situated about 314 feet west of said Garden Street. This Jefferson Street crossed the railroad right of way and the railroad track. It does not appear from the record whether this was a public crossing or not. The plaintiff alleged that the defendant had closed or obstructed this space known as Jefferson Street, and that by reason thereof plaintiff had no outlet to the paved highway, and as a result of the closing of the space known as Jefferson Street, it became necessary for plaintiff to discontinue his brick plant because of lack of access thereto. The defendant contended that Garden Street was opened up entirely across his land to the railroad right of way.

At the conclusion of plaintiff's evidence there was a judgment of nonsuit, and the plaintiff appealed.

F. W. Williams, R. M. Weaver and Hastings & Booe for plaintiff.
Walter E. Brock for defendants.

BROGDEN, J. The plaintiff alleged in his complaint "that the defendants designated and stipulated a road a "way of necessity" over their own land to the public highway, the same to be used for the benefit of plaintiff, and described as follows: "This property will have road platted to Walkertown or paved highway." In paragraph 6 of the complaint plaintiff alleged: "That on or about 15 August, 1923, the defendant closed or caused to be closed said road or 'way of necessity' to the said tract of land." It was further alleged that, as a result of closing said "way of necessity" the plaintiff sustained damage because he "was surrounded and hedged in and had no outlet, and was precluded from hauling material and wood for the burning of brick, and was unable to get other land for the purpose of carrying on his work in making brick and doing other work necessary on the yard as brick-makers."

The defendant admitted the fourth allegation of the complaint, in which it was alleged that the defendants designated and stipulated a "way of necessity" over their land.

It is apparent therefore that the sole cause of action alleged in the complaint was the failure of the defendant to furnish a "way of necessity" over his land.

It is further apparent that the covenant in the deed, "This property will have a road platted to Walkertown or paved highway," has been construed by the parties in their pleadings as confining the scope of this case to a "way of necessity."

This cause was considered by the Court in *Brick Co. v. Hodgin,* 190 N. C., 582. *Justice Varser,* speaking for the Court in the former appeal, says: "However, the parties stipulated for a 'way of necessity' to the Walkertown highway, their rights thus established are the same as when 'a way of necessity' to the designated highway had been established *in invitum.* It is the right of plaintiff to pass over the defendant's lands, owned by him 2 February, 1923 (the date of the deed), to the Walkertown highway. The vendor selects the way and if he fails to select, the vendee may select. This way is one of necessity, and therefore not one of convenience."

This declaration of the law contains three distinct and clear cut propositions:

1. The parties contracted for a way of necessity over the land of defendant, owned by him the date the deed was executed and delivered.

2. The vendor has a right to select the way.

3. The convenience of the parties claiming a "way of necessity" is not the controlling consideration.

Justice Varser says further: "Of necessity such a road may be located, according to the evidence, in more than one place, and the contract for such a road would be satisfied when the necessity, and not the convenience, is met."

The theory upon which the case was tried, as reported in 190 N. C., 582, and the theory upon which the present case has been tried, was that the space known as Jefferson Street was a "way of necessity" to which the plaintiff was entitled, and that the defendant had closed or obstructed said "way of necessity." In the former appeal the Court declared the principles of law governing the rights of the parties. "A decision by the Supreme Court on a prior appeal, constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal." *Stacy, J. Ray v. Veneer Co.,* 188 N. C., 414. See, also, *Harrington v. Rawls,* 136 N. C., 65; *Nobles v. Davenport,* 185 N. C., 162.

The present record discloses the fact that the space known and designated as Jefferson Street was not a public road, but was the property of H. O. Dixon, who testified that he owned all the land designated as Jefferson Street and had owned it since 1921. Therefore, Jefferson

Street did not cross the property of the defendant at all, hence, under the decision in the former case, and under the pleadings appearing in the record, the defendant discharged his obligation to the plaintiff when he platted across the land owned by him on 2 February, 1923, a reasonably proper outlet for the plaintiff. "It has been the invariable rule with us to hear a cause here according to the theory upon which it was tried in the Superior Court." *Webb v. Rosemond*, 172 N. C., 848; *Allen v. R. R.*, 119 N. C., 710; *Coble v. Barringer*, 171 N. C., 445; *Shipp v. Stage Lines, ante*, 475.

Therefore, it appearing that the cause of action alleged in the complaint was based solely and entirely upon a "way of necessity" across the land of the defendant, and it further appearing that the defendant has provided a way across his land, the judgment of the trial judge was correct.

No error.

KATE H. UNDERWOOD MOORE v. JEFFERSON STANDARD LIFE INSURANCE COMPANY.

(Filed 17 November, 1926.)

1. **Appeal and Error—Issues—Evidence—Broadside Exceptions.**

Where the recovery under a policy of accident insurance depends upon the verdict upon several issues arising under certain stipulations of the policy, exception to evidence as applying solely to one of them and relating to all, will not be sustained on appeal.

2. **Insurance, Accident—Policy—Contracts—Stipulations—Issues—Agreement of Parties—Automobiles.**

Where the defense to an action upon an automobile accident policy of insurance, among other things, provides that the insurer will not be liable if the insured was not sane or sober, and the defendant agrees that the insured was not insane at the time, failure of the judge to instruct the jury as to the former condition is not erroneous.

3. **Same—Evidence—Collective Facts—Opinions—Nonexpert Witnesses.**

Where the insurer's defense to an action upon an automobile accident policy, is nonliability under the express terms of a policy contract as to the insured not being sober at the time of the accident, it is competent for witnesses to the fact to testify in plaintiff's behalf that he was sober immediately before and after the occurrence, as a collective fact of ordinary observation.

4. **Evidence—Witnesses—Impeachment—Statements.**

Upon an issue arising under the terms of an accident policy of insurance, as to whether the insured was sober at the time of the accident in suit, a statement in writing and signed by plaintiff's witness is not competent as impeaching evidence which does not contradict his testimony, but only in that respect is the opinion of another.

5. **Evidence—Insurance, Accident—Policy—Contracts — Drink — Appeal and Error.**

Where the defense to an action upon an automobile policy of accident insurance is under a provision in the policy exempting the insurer from liability if the plaintiff was not sober, the condition of the plaintiff in this respect is to be ascertained at the time of the injury, and not dependent upon his usual state of insobriety, or whether he had previously received treatment for an alcoholic appetite at an institution for that purpose, and such evidence is properly excluded.

6. **Instructions—Appeal and Error—Insurance, Accident—Policy—Contracts—Defenses.**

Where the insurer under an automobile accident policy defends under a stipulation in the policy contract excluding liability if the insured was not sane or sober at the time of the injury in suit, the judge is not required to charge, on defendant's appeal under our statute, upon the law of insanity, when the defendant has withdrawn its defense thereon.

STACY, C. J., dissenting.

APPEAL by defendant from judgment of *Daniels, J.*, at April Term, 1926, of CUMBERLAND. No error.

Action upon policy of insurance. At the trial below defendant did not contest its liability under the policy to plaintiff, the beneficiary named therein, in the sum of $2,500, the "face amount" of the policy.

It is provided in the policy that defendant will pay double this amount, if the death of the insured results, within ninety days after the occurrence of the injury, directly and independently of all other causes, from bodily injury effected solely through external, violent and accidental means, "while the insured is sane and sober."

The death of the insured resulted from bodily injuries, caused by an accident resulting from the breaking of the radius rod of an automobile which he was driving. The only contested issue submitted to the jury was as follows:

"4. Was the insured at the time of the injury sane and sober? The jury answered the issue, 'Yes.'"

From judgment that plaintiff recover of defendant the sum of $5,000, double the "face amount" of the policy, less the amount due by insured on a premium note, with interest and costs, defendant appealed to the Supreme Court.

Bullard & Stringfield for plaintiff.
Brooks, Parker & Smith and Rose & Lyon for defendant.

CONNOR, J. The issues submitted to the jury were as follows:

1. Did the insured, James Absalom Moore, die on or about 12 July, 1924? Answer: . . .

2. Did the death of insured result within ninety days after the occurrence of the injury to him? Answer: .....

3. Did the death result directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means? Answer: .....

4. Was the insured at the time of the injury sane and sober? Answer: .....

At the close of all the evidence, the first three issues were withdrawn from the jury and answered "Yes," by consent. Only the fourth issue was submitted to the jury. Manifestly, an exception taken during the progress of the trial, to the admission or exclusion of evidence offered upon the first three issues, and pertinent only to one of these issues, cannot be made the basis of an assignment of error upon appeal to this Court from the judgment. Matters involved in these issues are no longer in controversy. Only assignments of error pertinent to the contested issue can be considered upon this appeal.

Objection by defendant to the testimony of witnesses that they saw deceased, immediately before, and shortly after he was injured, and that in the opinion of each he was then sane and sober cannot be sustained. The witness, Shumate, had been riding with deceased for several hours in the automobile, and was with him when the accident occurred; the witness, R. T. Ozment, and John Robert Ozment, saw deceased soon after the accident and before he had been removed from the scene of the wreck; the witness, Joe Moore, brother of deceased, saw him soon after he had been taken to the hospital, where he subsequently died. Each of these witnesses had opportunity to observe deceased, either at the time he was injured, or soon thereafter; his testimony was competent upon the issue, submitted to the jury. Assignments of error based upon exceptions with respect to the admission of this evidence cannot be sustained.

It was competent for each of these witnesses to testify that in his opinion deceased was sane and sober, at the time he saw him. "The instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals or things, derived from observation of a variety of facts presented to the senses at one and the same time, are, legally speaking, matters of fact and are admissible in evidence. A witness may say that a man appeared intoxicated, or angry or pleased." *Bane v. R. R.*, 171 N. C., 328; *S. v. Leak*, 156 N. C., 643; McKelvey on Evidence, p. 220 *et seq.* Manifestly upon this principle, a witness may say that a man appeared sane and sober.

For the purpose of impeaching the witness Shumate, defendant offered what purported to be a statement prepared by another and

signed by him soon after the accident. Shumate had testified for plaintiff that deceased was sane and sober at the time he was injured. The signed statement, dated 8 August, 1924, contains the following sentence: "On the night of 14 July, 1924, I volunteered to take Mr. James Moore of Fayetteville to his home after the police had threatened to lock him up *for being drunk.*" The court permitted the statement to be read to the jury with the exception of the words "for being drunk." Defendant excepted, for that the court declined to permit the entire sentence, as same appeared in the statement, to be read to the jury. This exception cannot be sustained. The statement with reference to the condition of deceased is to the effect that the policeman and not Shumate charged that deceased was drunk a short time prior to the accident. The statement does not contradict or impeach Shumate, as to the condition of deceased at the time he was injured. Shumate did not say in the statement that deceased was drunk, and that the policeman charged that he was drunk. It may well be that Shumate did not agree with the policeman. He rode thereafter with deceased for several hours in an automobile. There was no evidence that Shumate was drunk, or that he drank intoxicating liquor previous to or while riding with deceased. The accident was not due to the condition of deceased, but was caused by a defect in the automobile.

The testimony of Dr. Pittman that deceased had been treated in his hospital for drunkenness, prior to the date of his injury, was properly excluded. Defendant's liability was not to be determined by whether deceased was addicted to the use of intoxicating liquor, but by whether or not he was sane or sober at the time he received the fatal injury. The fact that deceased had been a patient in the hospital, suffering from the effects of intoxication, at some time prior to the morning following the accident was not relevant and was properly excluded as evidence.

The only remaining assignment of error is based upon defendant's exception to the failure of the judge to charge the jury as required by C. S., 564.

Defendant did not contend that deceased was not sane. Its contention was that he was not sober at the time of his injury. No instruction was therefore required as to the legal definition of sanity or insanity. A careful reading of the charge to the jury shows that his Honor stated therein, in a plain and correct manner the evidence given in the case applicable to the issue which the jury was instructed it was their duty to answer. He further instructed the jury as to the principles of law which should guide them in determining the credibility of the witnesses and the weight to be given to their testimony. The issue involved

solely a question of fact; the charge is not subject to the complaint made of the charge in *Nichols v. Fibre Co.*, 190 N. C., 1. The charge in the instant case complied fully with the requirements of the statute. We find no error therein. The judgment is affirmed.

No error.

STACY, C. J., dissenting: I think there was error, to the prejudice of the defendant, in not admitting the whole of the affidavit, made by the witness Shumate on 14 July, 1924, which, in my opinion, competently tends to impair the credibility of his testimony given at the trial.

The only contested issue before the jury was whether the assured was "sane and sober" at the time he received the injury which subsequently proved fatal. Shumate, who was with the assured for several hours prior to the accident, gave it as his opinion that he was sane and sober when injured. The witness had previously signed an affidavit, in which, *inter alia,* the following statements appear: "On the night of 14 July, 1924, I volunteered to take Mr. James Moore, of Fayetteville, to his home after the police had threatened to lock him up for being drunk. . . . I noticed that he had been drinking intoxicating liquor." His Honor admitted the affidavit, after striking out the words "for being drunk" in the first sentence and the word "intoxicating" in the second sentence above, giving as a reason: "I struck that part out, because he struck it out of his evidence." The fact that the witness testified differently on the trial is what makes the contradictory statements in the affidavit competent, as they tend to impeach his testimony. *Smith v. Tel. Co.*, 168 N. C., 515. This evidence was capitally important, as Shumate had been with the assured for several hours and was the only other person present at the time of the injury.

That the statements of a witness made out of court, orally or in writing, if contradictory in a material respect to his sworn testimony given on the trial, are competent to be offered in evidence, not as substantive proof of the truth of such statements, but for the purpose of discrediting the witness or impeaching his testimony, seems to be settled by all the authorities on the subject. *I. C. R. R. Co. v. Wade,* 206 Ill., 523; *People v. Pursley,* 302 Ill., 62, 134 N. E., 128; *Hanlon v. Ehrict,* 178 N. Y., 474; *Romertze v. Bank,* 49 N. Y., 577; Greenleaf on Evidence, sec. 463.

For the reason stated I am constrained to dissent from the judgment of the majority, as I think a new trial should be awarded the defendant.

J. E. STONE v. DOCTORS' LAKE MILLING COMPANY ET AL.

(Filed 17 November, 1926.)

1. **Actions—Torts—Deceit—Pleadings.**

In order to recover damages for tort or deceit in the sale of lands, it is required that the plaintiff specifically and definitely allege that the false representations of the defendant, the subject-matter of the action, causing the injury complained of, were made by the defendant with knowledge of their falsity, or with reckless disregard of their truth or falsity, and with the intent to deceive the plaintiff.

2. **Pleadings—Deceit—Tort—Allegations—Evidence.**

It is necessary that plaintiff allege sufficient facts to constitute the deceit or tort of defendant, causing damages in suit, to admit of evidence thereof.

3. **Appeal and Error—Trials—Election of Remedy—Review.**

Where the plaintiff has elected to try his action in the Superior Court exclusively on one theory, the Supreme Court on appeal will not review the case on a different one.

APPEAL by plaintiff from *Barnhill, J.*, at March Term, 1926, of WAKE.

Civil action for damages for the tort of deceit in the sale of land.

From a judgment of nonsuit, entered on motion of the defendants, at the close of plaintiff's evidence, the plaintiff appeals.

Manning & Manning for plaintiff.

R. N. Simms, Douglass & Douglass and J. W. Bailey for defendants.

STACY, C. J. The following appears in the statement of case on appeal:

"Plaintiff having announced before the introduction of evidence that the cause of action was based on tort for damages for false and fraudulent representations, and the court being of the opinion that upon such cause of action and evidence offered the plaintiff is not entitled to recover, allowed the motion of the defendant for judgment as of nonsuit."

We cannot hold this ruling to be erroneous, as no action for the tort of deceit is set out in the complaint. It is not alleged that the false representations, upon which plaintiff says he relied to his injury, were made with knowledge of their falsity or with reckless disregard of their truth or falsity, nor is it alleged that such false representations were made with intent to deceive the plaintiff.

The general conditions under which factual misrepresentations may be made the basis of an action for deceit are stated in Pollock on Torts (12 ed.), 283, as follows:

"To create a right of action for deceit there must be a statement made by the defendant, or for which he is answerable as principal, and with regard to that statement all the following conditions must concur:

"(a) It is untrue in fact.

"(b) The person making the statement, or the person responsible for it, either knows it to be untrue, or is culpably ignorant (that is, recklessly and consciously ignorant) whether it be true or not.

"(c) It is made to the intent that the plaintiff shall act upon it, or in a manner apparently fitted to induce him to act upon it.

"(d) The plaintiff does act in reliance on the statement in the manner contemplated or manifestly probable, and thereby suffers damage."

This formula has been approved by us in a number of decisions. *Corley v. Griggs, ante,* 171; *Simpson v. Tobacco Growers,* 190 N. C., 603; *Hollingsworth v. Supreme Council,* 175 N. C., p. 635; *Whitehurst v. Ins. Co.,* 149 N. C., 273.

Speaking to the subject in *Tarault v. Seip,* 158 N. C., 363, *Brown, J.,* said: "An essential element of actionable fraud is the *scienter* or knowledge of the wrong on the part of the vendor. Where the representation is made as a part of the warranty, the vendor is held liable for his statement, whether he knew it to be true or not, but where the action is for fraud the burden is upon the party setting it up to prove the *scienter.* This distinction is well made by *Chief Justice Pearson* in *Etheridge v. Palin,* 73 N. C., 216, and is well supported by numerous authorities in this and other states. This Court said in *Tilghman v. West,* 43 N. C., 183: 'Nor can fraud exist where the intent to deceive does not exist, for it is emphatically the action of the mind that gives it existence.' And in *Hamrick v. Hogg,* 12 N. C., 350, *Judge Henderson* says: 'It is not sufficient that the representation be false in point of fact; the defendant must be guilty of a moral falsehood. The party making a representation must know or believe it to be false, or, what is the same thing, have no reason to believe it to be untrue.' The action for fraud and deceit rests in the intention with which the representation is made, and not upon the representations alone."

To like effect is the language of *Varser, J.,* in *Colt v. Kimball,* 190 N. C., 169; "It is accepted in this jurisidction that the facts relied upon to constitute fraud, as well as the fraudulent intent, must be clearly alleged (citing authorities). Fraud must be charged positively and not by implication. . . . Fraud must be charged so that all its necessary elements appear affirmatively." (Citing authorities for the position.)

Our decisions are to the effect that "where it is sought to base one's relief on the ground of fraud, the allegations of fact must be specific and definite." *Evans v. Davis,* 186 N. C., p. 45.

In *Galloway v. Goolsby,* 176 N. C., 635, it was held that a representation as to the number of acres in a certain tract of land, alleged to be false and fraudulent and inducing the purchase, was insufficient to support an action for fraud, as it was not alleged "that there was any intent to defraud and deceive."

A party seeking to set aside a deed for fraud "was compelled to file his bill formerly in a court of equity and must allege such facts in his pleadings are relied upon to establish the fraud." *Helms v. Green,* 105 N. C., 251.

A complaint which failed to allege that the fraud charged against the defendant was intended to injure the plaintiff, was held defective in *Farrar v. Alston,* 12 N. C., 69. And in *Witherspoon v. Carmichael,* 41 N. C., 143, it was held that without a direct and positive charge of fraud, the plaintiffs would not be permitted to prove the fraud, and, of course, could have no relief on account of it.

A complaint which contains no allegation of a fraudulent intent, or facts from which it may reasonably be inferred, fails to state a cause of action for deceit, and such defect may be taken advantage of by demurrer. *Bryan v. Spruill,* 57 N. C., 27.

Proof without allegation is as unavailing as allegation without proof. *Dixon v. Davis,* 184 N. C., p. 209; *Green v. Biggs,* 167 N. C., p. 422; *McCoy v. R. R.,* 142 N. C., p. 387.

The allegations of false warranty, or of breaches of covenants in the deed, were waived at the trial, as appears from the record, above quoted; hence, as the plaintiff elected to try his case in the Superior Court exclusively on the theory of deceit, we are required, by the pertinent decisions, to consider it in the same way on appeal. *Shipp v. United Stage Lines, Inc., ante,* 475, and cases there cited.

We do not find the defect in the complaint, viewed in the light of the trial, aided sufficiently by the answer to warrant a reversal of the judgment of nonsuit, as suggested by the plaintiff *(Ricks v. Brooks,* 179 N. C., 204), for, upon another hearing, the complaint, without amendment, would be subject to demurrer, so far as the action of deceit is concerned. The decision in *Foy v. Stephens,* 168 N. C., 438, is not at variance with this position.

Affirmed.

W. T. WOOD ET AL. v. W. S. BRASWELL, SHERIFF.

(Filed 24 November, 1926.)

Constitutional Law—Actions—Hypothetical Questions — Taxation — Appeal and Error.

The courts will not decide upon the constitutionality of a statute, in this case the question of an inequality of taxation, in an action wherein it is not alleged or shown that the plaintiff has therein been deprived of any of his constitutional rights.

STACY, C. J., concurring.

CIVIL ACTION, before *Lane, J.*, at August Term, 1926, of ANSON.

The plaintiff and others instituted a civil action against the defendant, sheriff of Anson County, to restrain the collection of a license tax of five dollars upon each automobile and motor truck owned by any person, firm, or corporation residing in Anson County. The license tax on automobiles in said county is levied under chapter 511, Public-Local Laws 1925. A temporary restraining order was issued, and upon the hearing before Lane, J., on 30 August, 1926, the following judgment was rendered, from which said judgment plaintiff appealed:

"This cause coming on to be heard, and being heard before his Honor, H. P. Lane, judge, holding the courts of the Thirteenth Judicial District, and after hearing the pleadings and arguments of counsel, it is ordered and adjudged by the court that chapter 511, Public-Local Laws 1925, entitled *'An act to provide funds for road maintenance in Anson County,'* is in all respects, and in all its provisions, constitutional and valid:

"It is further ordered and directed that the sheriff of Anson County proceed to collect all taxes levied pursuant to the provisions of said act and in conformity therewith.

"It is further ordered that the restraining order heretofore issued in this cause, be and the same is hereby discharged and the action dismissed, and the plaintiffs taxed with the cost."

M. C. Lisk for plaintiff.

McLendon & Covington and Robinson, Caudle & Pruette for defendant.

BROGDEN, J. The plaintiff attacks the constitutionality of chapter 511, Public-Local Laws 1925, upon the ground that it denies the equal protection of the law and discriminates against taxpayers in the county of Anson; and, further, upon the ground that the act in question violates Article II, sec. 29, of the Constitution of North Carolina, which provides, among other things, as follows: "Nor shall the General Assembly enact any such local, private or special act by a partial repeal

of a general law." The general law, C. S., 2612, provides that "no county, city or town shall charge any license or registration fee on motor vehicles in excess of one dollar per annum." Therefore, the plaintiff contends that chapter 511, Public-Local Laws 1925, in attempting to levy a license tax of five dollars on automobiles, repeals, so far as Anson County is concerned, a general law, to wit, C. S., 2612, sec. 2.

The plaintiffs allege in substance that they are residents and taxpayers of Anson County, and that the defendant is the sheriff of Anson County, charged with the duty of collecting taxes levied by the Legislature and board of commissioners of said county. And, further, that the plaintiffs are informed, believe and so allege, that the defendant, sheriff, has collected, and is now attempting to collect, tax as hereinbefore alleged.

The plaintiffs do not allege that they are owners of automobiles or motor trucks, or that the sheriff has collected or is attempting to collect any license tax from these particular plaintiffs. Therefore, there is no allegation that any property right of plaintiffs has been invaded as a result of chapter 511, Public-Local Laws 1925.

In *Moore v. Bell,* 191 N. C., 311, *Connor, J.,* speaking for the Court, says: "The validity of a statute enacted by the General Assembly of North Carolina, declaring certain acts therein defined to be unlawful, and imposing punishment therefor, as crimes, which do not affect property or property rights, and which do not expose to oppression or vexatious litigation one who denies the power of the General Assembly, under the Constitution of the State to enact such statute, in the event that he shall violate its provisions, may not be determined in an action to restrain and enjoin a public officer who is required by the statute to enforce it. The invalidity of a statute, upon the ground that it is in violation of the Constitution of the State, is a good defense upon a prosecution in the courts for a violation of its provisions. Upon such prosecution his plea may be heard; its validity will then be determined by the courts in the exercise of their jurisdiction to see that no person is 'taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land.' We are precluded, upon this appeal, from considering or deciding whether or not the statutes are void for the reasons assigned by plaintiffs." *Thompson v. Lumberton,* 182 N. C., 260; *Turner v. New Bern,* 187 N. C., 548; *Adv. Co. v. Asheville,* 189 N. C., 737.

In *S. v. Corpening,* 191 N. C., 752, *Stacy, C. J.,* says: "The courts never anticipate a question of constitutional law in advance of the necessity of deciding it." *Commissioners v. State Treasurer,* 174 N. C., 148; *Person v. Doughton,* 186 N. C., 725.

As there is no allegation in the complaint and no finding of fact to the effect that any property right of plaintiffs has been invaded, the question presented in this appeal is purely a hypothetical question as to the constitutionality of a statute enacted by the Legislature. This Court, therefore, is precluded from passing upon the constitutionality of said statute, and the judgment is

Affirmed.

STACY, C. J., concurring: By Art. IV, sec. 2, of the Constitution, the judicial power of the State is vested in a court for the trial of impeachments, a Supreme Court, Superior Courts, courts of justices of the peace, and such other courts, inferior to the Supreme Court, as may be established by law; and this power—the power to say, not what the law ought to be, but what the law is—carries with it, not only the authority, but also the duty, to declare acts of the Legislature void when in conflict with the Constitution. *R. R. v. Cherokee County,* 177 N. C., 86. Such authority is inherent in the judicial power and it is obligatory on the courts to declare the law in all cases, when properly presented. But it is only in cases calling for the exercise of judicial power that the courts may render harmless invalid acts of the Legislature; hence, for this reason, they never anticipate questions of constitutional law in advance of the necessity of deciding them; nor do they venture advisory opinions on constitutional questions. *Person v. Doughton,* 186 N. C., p. 725. It is only when the courts are exercising the judicial power vested in them by the Constitution that they are authorized to hold acts of the Legislature in contravention of the organic law. *Adkins v. Children's Hospital,* 261 U. S., 525.

HENRY G. FLAKE ET AL. v. BOARD OF COMMISSIONERS OF ANSON COUNTY ET AL.

(Filed 24 November, 1926.)

1. Schools—Taxation—County-wide Plans—Statutes—Elections — Notice —Bond Issues.

Where a county-wide plan of education has been duly adopted under the provisions of our statute, 3 C. S., 5481, and an existing school district has been added to others in the formation; and upon a proper petition the board of county commissioners have duly ordered an election to ascertain the will of the voters upon the question of issuing bonds for school purposes therein, the result of the election approving the issuance of the bonds, will not be impaired upon the ground that notice of the election was only published twice in a newspaper, when the statute

requires its publication three times, by reason of the fact that the notice of the election and that of registration were published in the same issue of the newspaper, and therefore not thus given thirty days at least before the election, when there is no suggestion that the election would have been changed.

2. Same—Mandatory and Directory Statutes.

Under our statute requiring the publication of notice three times in a newspaper published in a county, the first at least thirty days before an election to ascertain whether the electors of a school district approved the issuance of bonds therein for school purposes: *Held*, the requirements of the statute as to the first publication in a newspaper, etc., and the giving of the specified time are mandatory if they affect the merits of the election, and directory if they do not.

3. Same—Technical Error of Publishing Notice as to the Statute.

Where the board of county commissioners has ordered an election to be held in a new school district created under the provisions of 3 C. S., 5481, the validity of the election approving the issuance of the bonds will not be necessarily affected by the fact that the commissioners determined that the election should be held under the provisions of one valid statute, and the published notice erroneously stated it was to be held under a different one.

4. Same—Questions of Law—Issues—Jury.

Where it appears from the judgment and the record on appeal that the issuance of school bonds for a certain new district were not invalid for the failure to publish the notice of the election in three issues, the first at least thirty days before the time of election, as a matter of law, no issue upon this question is raised that requires the determination of a jury. Instances where such districts are consolidated, distinguished.

APPEAL by plaintiffs from *Finley, J.*, who vacated an order restraining the collection of a tax for schools in the Polkton Consolidated Special School District. From ANSON. Affirmed.

Barrington T. Hill for the plaintiffs.

Robinson, Caudle & Pruette and McLendon & Covington for defendants.

ADAMS, J. The Legislature has prescribed the method by which the county boards of education may adopt a county-wide plan for the organization of the schools in their respective counties. 3. C. S., 5481; Public School Law, sec. 73-a. The plan was duly adopted by the board of education in Anson County on 21 July, 1924. *Harrington v. Comrs.*, 189 N. C., 572. At this time the board had under consideration the consolidation of the Brown Creek District and the Wadesboro Special Charter District, but some time afterwards it learned that the trustees of the latter district would not consent to the consolidation. For this reason it was thought advisable to modify the adopted plan of organiza-

tion with a view to forming another district which should include the Brown Creek District and the Polkton District. After due notice the county board of education held a meeting on 24 June, 1925, attended by committeemen and patrons in which there was a general discussion of the proposed change. Another meeting was held on 6 July, 1925, and the board then created and defined the boundaries of a school district known as the Polkton Consolidated Special School District, including in addition to other territory the Brown Creek District and the Polkton District. 3 C. S., 5481; Public School Law, 73-a; Public Laws, Ex. S., 1924, ch. 121, sec. 2. After the modification was made and the new district was created a petition signed by the requisite number of qualified citizens was presented to the board of education asking that an election be held in the district to ascertain whether there should be levied therein a local annual tax not to exceed fifty cents on the one hundred dollars valuation of property to supplement the funds for the six months term. Pursuant to an order of the board of county commissioners an election was held in the new district on 12 September, 1925, and a majority of the qualified voters favored the special tax. The bonded indebtedness of $1,500 outstanding against the Polkton School District was assumed by the county board of education; and in reference to the other territory (included in the Polkton Consolidated Special School District) in which a special tax had been voted, it was stated in the petition and in the notice of the election that if the proposed tax was voted all former taxes should thereby be voted off. 3 C. S., 5659; Public School Law, sec. 238; *Harrington v. Comrs., supra: Causey v. Guilford, ante,* 298, 311.

When the case came on for hearing the judge not only dissolved the restraining order, but adjudged that the Polkton Consolidated Special School District had been created in accordance with law; not only that the election had been lawfully conducted, but that the result authorized the levy of the tax. This judgment the plaintiffs have assailed on three grounds: (1) Notice of the election was published in a newspaper not three times, but only two. (2) In the published notice it was said that the election would be held by virtue of a statute different from that applicable to school districts. (3) The territory in which the election was held had not been consolidated into one school district and the proposed tax could not properly be levied.

1. The statute provides that notice of the election shall be given by publication at least three times in some newspaper published or circulated in the territory; that the first publication shall be at least thirty days before the election; that a new registration shall be ordered and that notice of registration may be considered one of the three notices of the election. The notice of the election and the notice of registra-

tion were published at the same time, and the plaintiffs say that one notice cannot be disjoined from the other with the effect of making them two notices instead of one, thus leaving only two published notices of the election. If this be granted the election is not thereby necessarily invalidated. There is no suggestion that any elector was deprived of his vote or that the result would have been changed if the publication had been made in different issues of the paper. If a statute simply provides that certain things shall be done within a particular time or in a certain way and does not declare that their performance is essential to the validity of the election, they will be regarded as mandatory if they affect the merits of the election and directory if they do not. McCrary on Elections (3 ed.), sec. 190, cited with approval in *Hill v. Skinner,* 169 N. C., 405. Under circumstances somewhat similar to those presented in the case before us the Court remarked that our decisions fully justify us in holding that the technical failure to give notice for the full prescribed time should not be allowed to affect the result or to defeat what is clearly an expression of the popular will. *Miller v. School District,* 184 N. C., 197. See, also, *Newsom v. Earnheart,* 86 N. C., 391; *DeBerry v. Nicholson,* 102 N. C., 465; *Davis v. Board of Education,* 186 N. C., 227; *Plott v. Comrs.,* 187 N. C., 125.

2. The petitioners requested an election under Public Laws 1923, ch. 136, Art. 17; the board of commissioners ordered that an election be held under this article; the published notice referred to an election to be held under chapter 135 instead of 136. This, as pointed out in the judgment, was a typographical error which did not invalidate the petition, the order, or the election.

3. The third ground of exception is that the districts were not legally consolidated; that there can be no legal consolidation except in conformity with the county-wide plan; that committeemen and patrons filed affidavits that they had no notice of the intended change, and that though it is declared in the judgment that they did receive the notice the matters in dispute should have been submitted to a jury.

The county board of education did not attempt to consolidate districts; it created a new district. 3 C. S., 5481. The plaintiffs insist that this action was void because proper notice of the meeting had not been given; but there is evidence that the committeemen and patrons were notified and that at the hearing the Brown Creek District was represented by a committee in a general discussion of the proposed modification. And then at the adjourned meeting a delegation from the same district, including some of the committeemen, was present. Upon the evidence the judge found as a fact, and set forth in his judgment, that due notice of the meeting had been given; and as the district was fairly represented in more than one meeting held before the new district

was created we see no sufficient reason to reverse or modify this conclusion, even if there was an irregularity in the publication of the notice. The intervention of a jury was not necessary to determine the questions presented. The motion to continue the restraining order was heard upon the pleadings and affidavits, the plaintiffs taking the position that upon the admitted facts the tax should have been declared illegal and the injunction made permanent. As to the one or two remaining questions reference may be made to *Causey v. Guilford, supra; Harrington v. Comrs., supra; Blue v. Trustees*, 187 N. C., 431. The judgment is Affirmed.

STATE v. JOHN GRAY.

(Filed 24 November, 1926.)

Criminal Law—Evidence—Declarations—Voluntary Confessions—Arrest—Presence of Officers—Appeal and Error.

The written admissions of a prisoner of his guilt in committing the murder for which he was on trial, are not rendered involuntary because they were made in the presence of officers of the law merely, and their admission on the trial under such circumstances is not erroneous.

APPEAL by defendant from *Schenck, J.*, at March Term, 1926, of STANLY.

Criminal prosecution tried upon an indictment charging the prisoner with a capital felony, to wit, murder in the first degree.

From an adverse verdict and sentence of death entered thereon, the prisoner appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

W. L. Mann for defendant.

STACY, C. J. There is evidence on behalf of the State tending to show that Dad Watkins, late of Stanly County, had been missing about sixty days when, on the night of 31 October, 1925, an old barn, standing about a mile or mile and a half north of Albemarle, was burned, and in the ruins was found the charred body of the deceased, badly mutilated. It is the contention of the State that the defendant slew the deceased in an effort to rob him, and after cutting off his hands and feet and head, placed his torso in the old barn, and set fire to the building in an effort to destroy all evidence of the crime. The identification of the body, the *corpus delicti*, was submitted to the jury for determination. An adverse verdict has been rendered against the prisoner.

The appeal presents but a single question, to wit, the competency or incompetency of two alleged confessions made by the prisoner on 18 and 27 March, 1926, respectively. Both statements are in writing. They are signed by the prisoner. In practical effect they amount to a confession of guilt, though somewhat contradictory in several immaterial respects.

To the introduction of these statements, the accused, through his counsel, objected, on the ground that said confessions were not given voluntarily; that they were obtained from him by an officer while he was in custody and surrounded by other officers, hence, he contends, being under duress at the time said statements were made, they are not admissible as evidence against him.

The only compulsion alleged was the presence of the officers and the fact that the prisoner was in custody at the time. After a preliminary investigation, his Honor held that the confessions were given voluntarily, and permitted the solicitor to offer them in evidence against the prisoner. This ruling is supported by the evidence. *S. v. Whitener,* 191 N. C., 659, and cases there cited. We are not aware of any decision which holds a confession, otherwise voluntary, inadmissible because of the number of officers present at the time it was made. Nor has the diligence of counsel discovered any. *Ziang Sung Wan v. United States,* 266 U. S., 1, 69 L. Ed., 131.

A careful perusal of the record reveals no error committed on the trial.

The learned counsel appointed by the court to represent the prisoner has brought up his appeal, without money and without price, to the end that the accused may not suffer death except as the law commands. Such a duty comes to every lawyer now and then. It is to the credit of a great profession and to the administration of justice that no citizen, however poor, is denied the benefit of counsel in our courts. This much is said because it is but just that such gratuitous services should be counted for righteousness to those who render them cheerfully.

The verdict and judgment must be upheld.

No error.

B. VON HERFF v. S. B. RICHARDSON AND W. A. PERKINS.

(Filed 24 November, 1926.)

1. Deeds and Conveyances—Lands—Specific Descriptions—Questions of Law—Location—Questions for Jury.

Where the interpretation of the deed conveying lands depends as to its including the *locus in quo* upon the point of beginning, the specific

and more clear definition of this point will control a more general one as a matter of law for the court, and the location of this point on the lands is a question for the jury under conflicting evidence.

2. Appeal and Error—Judgments Set Aside—Questions of Law—Burden of Proof.

Where the judge has set aside a verdict of the jury upon the ground that he has erroneously stated the law upon a controlling phase of the case, his action in so doing will be sustained in the Supreme Court, unless the appellant makes it appear of record that it was erroneous.

APPEAL by plaintiff from *Stack, J.,* at February Term, 1926, of MOORE.

Civil action to quiet title and to remove cloud therefrom, arising from claim of defendants that their deeds cover the *locus in quo.*

There was a verdict in favor of the plaintiff, which was set aside as a matter of law, for error in the charge, and from this ruling the plaintiff appeals. The defendants also gave notice of appeal, but this was not perfected.

H. F. Seawell for plaintiff.
J. C. Little for defendants.

STACY, C. J. The controversy on trial narrowed itself principally to a contest over the location of the beginning point in the description of the lands conveyed by deed from H. A. Bland and J. E. Buchan to J. T. Patrick, which said deed forms a link in the defendants' paper-chain of title. The pertinent parts of the description contained in this deed are as follows:

"Beginning at a stake in the right of way of the R. and A. A. L. R. R., in Moore County, near Shaw's Ridge and on the southwest end of a curve and runs thence (here follows a particular description by metes and bounds), containing 532 acres, more or less, the above lands being deeded to Bland and Buchan by W. O. Robeson and wife, and to them by John Shaw and P. C. Shaw, they being heirs at law of P. C. Shaw, deceased."

The reasons which induced the trial court to set aside the verdict as a matter of law are stated in the judgment as follows:

"The court is of opinion that it committed error in the charge to the jury in leaving to them the question as to whether or not they should be controlled, in locating the defendants' lands, by the particular description in the Patrick deed or by the general description therein referring to the Robeson deed, and in not instructing the jury to begin at the stake at the southwest end of the curve in the railroad wherever they found that to be on the ground. The Court is further of the

opinion that the reference to the Robeson deed was to give the source of the title and not intended as a part of the description of the land intended to be conveyed in the deed to Patrick; but, if intended as descriptive of the lands, then there would be a conflict in the two descriptions and the particular description beginning at southwest end of railroad curve would control and the court should have so charged the jury."

In the light of the evidence, this ruling would seem to be correct, or, at least, the contrary is not made to appear on the record.

In matters of location it is the duty of the court to tell the jury what the boundaries are, and it is the duty of the jury to find and locate them. *Geddie v. Williams*, 189 N. C., 333; *Brooks v. Woodruff*, 185 N. C., 288. "What are the *termini* or boundaries of a grant or deed is a matter of law; where those boundaries or *termini* are is a matter of fact. It is the province of the court to declare the first, that of the jury to ascertain the second." *Henderson, J.*, in *Tatem v. Paine*, 11 N. C., 71.

It is conceded that, except when otherwise controlled by some canon of construction or arbitrary rule of law, a deed, as well as a will, is to be construed from its four corners, and according to its obvious intent. *Boyd v. Campbell, ante*, 398; *Bagwell v. Hines*, 187 N. C., 690; *Triplett v. Williams*, 149 N. C., 394.

But as between two descriptions, the law ordinarily prefers the specific to the general, or that which is more certain to that which is less certain. *Cox v. McGowan*, 116 N. C., 131; *Carter v. White*, 101 N. C., 30; *Peebles v. Graham*, 128 N. C., 218; *Gaylord v. McCoy*, 158 N. C., 325; *Prentice v. R. R.*, 154 U. S., 164.

The decision in *Quelch v. Futch*, 172 N. C., 316, is not at variance with this position, for there it was conceded that the specific description did not cover the land described in the complaint. Just the reverse appears in the instant case.

Affirmed.

CHLOE TINSLEY v. CITY OF WINSTON-SALEM.

(Filed 24 November, 1926.)

1. Municipal Corporations—Cities and Towns—Streets and Sidewalks—Reasonably Safe Condition.

A municipality is held to the exercise of due care to keep its streets and sidewalks in a reasonably safe condition, and on failure thereof they are liable to one who receives an injury thereby proximately caused.

2. Same—Negligence—Evidence—Nonsuit.

Where a city has dug ditches for drainage or sewer pipes in the street and sidewalk in front of the residence of the citizen, and has the open ditches in the streets safeguarded at night, but not the one across the sidewalk, and the plaintiff has fallen into the latter during the night to her injury with evidence that the opening could not have been seen except with difficulty, because a light signal had not been placed there, and the shadow of a tree was cast upon the place by a small street light: *Held*, the absence of the guard and signal light under the circumstances was evidence of the city's actionable negligence, and its motion for judgment as of nonsuit should not have been allowed.

3. Same—Contributory Negligence.

Where there is evidence tending to show that the plaintiff in her action for damages against a city was injured by the defendant's negligence in leaving an unguarded open ditch across its sidewalk at night, the fact that she was aware of these conditions and could have avoided them by day is not sufficient for the granting of a nonsuit upon the evidence, the conditions existing at night being different from those of the day when she could have more readily seen her danger.

4. Same—Evidence—Inferences in Plaintiff's Favor.

Where there is conflicting evidence upon a material issue susceptible of different inferences in the plaintiff's favor, defendant's motion as of nonsuit should be denied.

APPEAL by plaintiff from *Lane, J.*, at March Term, 1926, of FORSYTH.

Wallace & Wells and Hastings & Booe for plaintiff.
Parrish & Deal for defendant.

ADAMS, J. This is an action to recover damages for personal injury. The defendant was paving North Trade Street. In the middle of the street a ditch had been cut for a water and sewer line, and on each side at right angles with it were several ditches through which the main line was to be connected with dwellings on the adjacent property. The plaintiff lived on the west side of the street. She offered evidence tending to show that for fifteen or twenty years she had used a sidewalk or pathway there in going from and returning to her home. She used it every day; it was the only way she had. The lateral ditch was cut into the sidewalk, and the path at this place was narrow. The street, but not the sidewalk, had been closed by barricades. In the street about thirty feet from the ditch nearest the plaintiff's house was a small electric light, the rays of which were obstructed by a shade tree so that, in the vernacular of a witness, "You couldn't see the mouth of this hole without you looked right down and knew it was there." There was no light on the sidewalk at this place; no other warning. About ten o'clock on the night of 25 March, 1925, the plaintiff fell into the ditch and

was severely injured. Her evidence tended to establish these circumstances. There was evidence in contradiction—evidence that the plaintiff's injury was caused solely by her own negligence; but the question is whether the evidence considered in the light most favorable to her was strong enough to justify the court in submitting it to the jury.

It is the duty of a municipal corporation to exercise due care to maintain its streets and sidewalks in a reasonably safe condition, and ordinarily a failure to perform this duty will be such negligence as will subject the municipality to liability for injury proximately resulting therefrom. A city or town is not an insurer; it is not held to the responsibility of warranting the safe condition of its streets, but it is responsible for a negligent breach of duty. The defendant had the right to extend the lateral ditch into the sidewalk, but it was required in the exercise of due care to see that those who had occasion to use the sidewalk were warned of the danger—in the exercise of such care to give proper warning by lights or otherwise or to guard against danger by barriers or by other means reasonably sufficient for the protection of the public. We do not say that the absence of a light at this particular place was essentially negligence; but it was a circumstance to be considered on the determinative question whether the sidewalk was in a reasonably safe condition and whether the defendant was negligent in the respects complained of. True, the plaintiff knew the ditch was there, but previous knowledge does not *per se* establish negligence. *Russell v. Monroe,* 116 N. C., 721. In leaving home before dark she saw the danger and escaped injury; whether she was able to do so in returning at ten o'clock is involved in doubt. The proof, which is susceptible of more than one interpretation, may satisfy the jury of the defendant's negligence, and where there is any evidence to support a material issue the case must be left to the decision of the jury. *Rollins v. Winston-Salem,* 176 N. C., 411; *Sehorn v. Charlotte,* 171 N. C., 540; *Smith v. Winston,* 162 N. C., 50; *Bailey v. Winston,* 157 N. C., 253; *Johnson v. Raleigh,* 156 N. C., 269; *Hester v. Traction Co.*, 138 N. C., 288.

Error.

C. E. BENNETT v. J. L. POWERS.

(Filed 24 November, 1926.)

Evidence—Nonsuit—Statutes—Master and Servant—Employer and Employee—Safe Place to Work.

Where an independent contractor has furnished his employee a safe place to go to and from his work for the installation of a steam-heating plant of a building, and without the knowledge of the contractor, the

employee on one occasion has voluntarily chosen an unsafe way to leave the work for the dinner hour with knowledge of the safe one by walking diagonally across loose rafters unprovided with a plank or other methods for this purpose, the danger of which he could readily perceive and the condition of which he was aware, and there is no other evidence of the employer's negligence: *Held*, a judgment as of nonsuit should have been entered upon the defendant's motion under the provisions of our statute, C. S., 567.

CLARKSON, J., dissenting.

APPEAL by defendant from *Barnhill, J.*, at April Term, 1926, of WAKE. Error.

Action to recover damages for personal injury, sustained by plaintiff while at work as an employee of defendant.

The jury found by its verdict that plaintiff's injury was caused by the negligence of defendant, as alleged in the complaint, and that plaintiff did not contribute to his injury by his own negligence. From judgment that plaintiff recover of defendant the sum of $12,500, the amount assessed by the jury as his damages, defendant appealed to the Supreme Court.

R. N. Simms, Douglass & Douglass, R. L. McMillan, R. Roy Carter and Burgess & Joyner for plaintiff.

Biggs & Broughton for defendant.

CONNOR, J. Upon his appeal to this Court, defendant relies chiefly upon his assignment of error based upon an exception to the refusal of the court to allow his motion for judgment as of nonsuit. This motion was duly made and exceptions duly taken as provided by C. S., 567. Defendant thus presents his contention that upon all the evidence, considered in accordance with the well-settled rule applicable upon the consideration of a motion for judgment as of nonsuit—*Boswell v. Hosiery Mills*, 191 N. C., 549—plaintiff is not entitled to recover of defendant in this action, for that the evidence, taken in the light most favorable to plaintiff, fails to sustain the allegations of the complaint, denied in the answer, and involved in the first issue, to wit: "Was the plaintiff injured by the negligence of defendant, as alleged in the complaint?"

The negligence alleged is the failure of defendant to use due care to provide a reasonably safe way for plaintiff, his employee, to pass into and out of the building in which he was required to work, in the performance of the duties of his employment. It is further alleged that this negligence was the proximate cause of plaintiff's injury.

On 16 March, 1925, defendant was engaged, as an independent contractor, in installing a heating system in the Science Building, at

Meredith College, near Raleigh, N. C.; on said day plaintiff was employed by defendant as a steam-fitter, and was at work in said building, connecting radiators with pipes, which were parts of said heating system; the mains had been put in, and defendant had been at work for two days connecting the laterals, on the west side of the building; the building, a structure 300 feet long, and 50 feet wide, was in process of construction; there was a hall from one end of the building to the other, with skeleton partitions on each side of the hall; there was a door at the north end of the hall, and one at the south end; joists or sleepers were in place, but the floors had not been laid; pipes for the heating system had been placed under these sleepers, and radiators had been set in positions to be connected with these pipes; during the morning, plaintiff had been at work connecting radiators near the west wall of the building, with pipes under the first or ground floor of the building.

At about noon, plaintiff was at work, connecting a radiator near the west wall, with the pipes which ran under the sleepers; this radiator was about 40 feet from the south wall and in a line running 45 degrees from the door in said wall; while plaintiff was at work beneath the sleepers, standing on the ground, he broke a small fitting. He took off the broken fitting and screwed on a good one. His helper called to him that it was dinner time. At about five minutes to twelve o'clock he came up from the ground, between the sleepers, and started toward the south door of the building, walking diagonally across the sleepers, intending to go out of the building through the south door for his lunch. No walkway had been provided from the place at which he had been at work to the door at the south end of the hall; between said place and said door there were sleepers, 2 by 12, placed about 13½ inches apart; these sleepers were shaky—they had been braced; floors had not been laid on them, nor were there any planks or boards across them, providing a walkway from the radiator to the door. In going from the radiator to the door plaintiff went in a diagonal direction, stepping from one sleeper to another, walking, as he testified, across the sleepers "catta wampus." He had not used this way in going out of the building before that morning. He was walking the best he could, and aiming to get to the outside door.

The only evidence appearing in the record as to the manner in which plaintiff was injured is his own testimony. No witness testified that he saw plaintiff immediately before or at the time he was injured. He testified that while walking across the sleepers, stepping from one to another, he slipped and fell, straddling a sleeper. After he fell his feet were about 18 inches from the ground. The shock caused him

severe pain. He got up, and after ascertaining by an examination of himself that he had sustained no external injury, he left the building and went to the shop. He was later taken home and then to a hospital, where he remained for some time under treatment. There was evidence that plaintiff's injury was serious and permanent, causing him much suffering and greatly diminishing his earning capacity.

On the morning of the day on which he was injured, plaintiff had entered the building and gone straight down the hall to his bench, where he kept his tools; after getting his tools he had gone directly across the hall to the west wall of the building where the radiators were placed. He had worked along the west wall during the morning toward the south wall, thus reaching the radiator which he was connecting with the pipes of the heating system, when he stopped work for dinner. A way was provided for him to go into and out of the building and to and from the place where he was required to work. He had used this way that morning to go into the building and to his work. He could have left the building by the same way that he had entered that morning with safety. There was a door in the partition between the hall and the room in which plaintiff was at work. Plaintiff could see through this hall door to the outside door at the south end of the hall. He knew that there were no boards or planks across the sleepers, and that the flooring had not been laid on the sleepers. He could see the conditions in the building. He testified that he did not think there was any danger, although he knew that it was more dangerous to walk across the sleepers than to walk on a floor. "Those sleepers were shaky—that made me fall. Those 12 by 2 sleepers were shaking within six feet of where they ended, and that is all that I can recall that caused me to fall."

A careful scrutiny of all the evidence set out on the record in this case fails to disclose, in our opinion, any breach of duty, which defendant owed to plaintiff, his employee, which was the proximate cause of his injury. Plaintiff was not injured at the place at which he was at work. Conceding that it was the duty of defendant to use due care not only to provide for plaintiff a reasonably safe place at which to work, but also reasonably safe ways by which plaintiff might pass into and out of the building, in which he was required by the terms of his employment to work, it appears from the evidence that defendant had performed this duty. Plaintiff undertook to leave the place at which he had been at work by a way which had not been provided by defendant. There is no evidence that he had been instructed by defendant or by his foreman to walk diagonally across sleepers, which were shaky or insecure, in order to get to the south door, and thence leave the building. If he had undertaken to leave the building by the same way

he had entered that morning, he would not, so far as the evidence discloses, have been injured. Defendant, having exercised due care to provide a reasonably safe way for plaintiff to pass into and out of the building and thence to and from his work, had fully performed the duty which was imposed upon him by law. Plaintiff voluntarily chose another way, which he knew was hazardous. Defendant cannot be held liable for damages sustained by plaintiff while leaving the building by a way not provided by defendant.

The rule that it is the employer's duty to use ordinary care to furnish his employee with a reasonably safe place for his work, is not restricted to the identical situs of the labor, but extends to the exercise of ordinary care to see that the means of egress and ingress provided by the employer or customarily used by the employee in going to and from his work on the premises of the master, and that the ways so provided or so used in passing from one part of the premises to another, in the course of his employment, are reasonably safe. *Elliott v. Furnace Co.*, 179 N. C., 142, and cases cited in opinion of *Hoke, J.*, 39 C. J., 349, sec. 408. Where, however, an employer has by the exercise of ordinary care provided reasonably safe means by which his employee can get to and from the place of his work, and the employee knows of such means, having previously used the same, but voluntarily chooses another and hazardous way, not provided by the employer, the employer cannot be held liable for damages resulting from an injury sustained by the employee, caused by the conditions of the way chosen by him without authority from or notice to the employer. It cannot be held that the injury was caused by the negligence of the employer; he is, therefore, not liable for damages resulting from the injury.

In *McAtee v. Mfg. Co.*, 166 N. C., 448, it is said that whether plaintiff in that case selected a safe way to do his work, in the exercise of proper care, when two ways were open to him, for the purpose, one safe and the other dangerous, was manifestly a question for the jury. Plaintiff relies upon this principle. It is not applicable upon the facts of this case, for we are here dealing with the question as to whether there was evidence of negligence on the part of defendant—not of contributory negligence on the part of plaintiff. In that case, *Judge Walker* says: "There certainly was evidence to show that the defendant had been negligent in furnishing the 'blackjack' for oiling the belt." He further says: "We cannot say as a matter of law that the evidence showed the risk and danger of using the blackjack to be so obvious that a reasonably prudent man would not, under like circumstances, have undertaken to do the particular work, and this question, therefore, was properly left to the jury." We are of the opinion that in this case, there was no evidence from which the jury could find that defendant

was negligent, or that his injury was caused by the negligence of defendant as alleged. No question of contributory negligence is presented.

Defendant's motion for judgment as of nonsuit should have been allowed. The judgment must be reversed. It is so ordered.

Error.

CLARKSON, J., dissenting.

MARIE M. RICH ET AL. v. R. A. DOUGHTON, COMMISSIONER.

(Filed 24 November, 1926.)

1. **Taxation—Statutes—Exemptions—Interpretation.**

Laws exempting religious, charitable, etc., organizations, from a tax imposed, are strictly construed, and require express statutory words or expressions to that effect, or the exemptions claimed follow by necessary implication from the language used in the statute.

2. **Same—Inheritance Tax—Religious Organizations—Domestic Corporations—Foreign Corporations.**

Our statute exempting from the inheritance tax "legacies or property passing by will or otherwise . . . to religious," etc., corporations not conducted for profit in this State, applies only to such as are incorporated under the laws of our State, and not to those existing under the laws of other states or foreign countries, and only operating herein.

CIVIL ACTION, before *Bond, J.*, at September Term, 1926, of WAKE.

D. Rich, a resident of Forsyth County, died 21 October, 1924, leaving a last will and testament. The fifth item of his will is as follows: "I will that 19/128 of my entire estate be given to religious, charitable and educational institutions as follows: (1) I will to the Foreign Mission Board of the Southern Baptist Convention at Richmond, Va., 7/128 of my entire estate to be used by it in sending missionaries to the foreign fields, as it may elect, preferably to continue in the foreign fields any missionaries in whom I have been personally interested, so long as their services are satisfactory to the board.

(2) I will to the Home Mission Board of the Southern Baptist Convention, at Atlanta, Georgia, 2/128 of my entire estate, to be used by it in building schools and churches, and paying missionaries within the bounds of the Southern Baptist Convention of the United States of America."

The court found as a fact that the Foreign Mission Board of the Southern Baptist Convention and the Home Mission Board of the

Southern Baptist Convention are foreign corporations, the Foreign Mission Board being a religious and educational corporation, not conducted for profit, organized and existing under the laws of the State of Virginia, and the Home Mission Board being a religious and educational corporation, not conducted for profit, organized and existing under the laws of the State of Georgia. Both of these boards constitute agencies through which the Baptists of North Carolina carry on mission work and other charitable and religious activities. The Revenue Commissioner of the State has ruled that the legacies in said will to the Foreign Mission Board and the Home Mission Board are subject to inheritance tax under the laws of North Carolina. The plaintiffs, who are the executors of the will of said deceased, challenged the correctness of this ruling and instituted this action to test the validity thereof. The cause was submitted upon an agreed statement of facts and the court adjudged "that said commissioner of revenue recover from the plaintiffs herein, executors of the estate of D. Rich, deceased, the sum of $6,801.05, with interest on the same at the rate of 6% per annum since 21 October, 1925," etc.

From the foregoing judgment plaintiffs appealed.

Manly, Hendren & Womble for plaintiffs.

Attorney-General Brummitt and Assistant Attorney-General Nash for defendant.

BROGDEN, J. Is property, passing by will of a resident of this State, or by the interstate laws thereof, to foreign religious corporations, liable for inheritance tax?

The exemption clause of the inheritance tax law is found in Public Laws 1925, ch. 101, sub-sec. 3, and is as follows: *"Provided,* that no tax be imposed or collected under this section on legacies or property passing by will or otherwise, or by the laws of this State to religious, educational or charitable corporations (not conducted for profit) in this State, and this provision shall apply to all such legacies or property passing by will or by the laws of this State since 12 March, 1913."

The plaintiffs contend that the "religious, educational or charitable corporations (not conducted for profit) in this State" refer to corporations operating in this State irrespective of the domicile of such corporations. "It is a well-established general rule that exemptions from taxation are to be strictly construed, and that no claim of exemption can be sustained, unless within the express letter or necessary scope of the exempting clause." *In re Hickok's Est.,* 62 Atlantic, 724. In *Hickok's case, supra,* the Vermont statute exempted from its operation

property passing "to or for charitable, educational or religious societies or institutions, the property of which is exempt by law from taxation." The legacies in that case passed to institutions incorporated in the states of Massachusetts, New York, Virginia and Illinois, and were, therefore, foreign corporations. The tax commissioner of Vermont held that foreign corporations were not within the exemption and the validity of the tax was upheld.

In *Humphreys v. State,* 70 Ohio St., 67, legacies were bequeathed to the American Bible Society, American Tract Society, and American Sunday School Union. All of these legatees were foreign corporations, not organized for profit, but for advancing the cause of religion. The Ohio statute exempted from inheritance tax property bequeathed or devised "to or for the use of any institution in said state for purposes of purely public charity or other exclusively public purposes." These legatees, although foreign corporations, had representatives in the State of Ohio, but the Court held that they were not "institutions in said state," and the validity of the tax was upheld.

In re Lyon's Estate, 128 N. Y. St., 1004, a gift was made to the American Baptist Missionary Union (Boston, Mass.). This corporation was a foreign corporation but had domesticated in New York, and the Court held that the legacy was not subject to the tax.

In *Alfred University v. Hancock,* 46 Atlantic, 178, the Court said: "The overwhelming weight of authority is that where the Legislature grants exemption from such a tax to corporations or organizations, it includes in the exemption only domestic corporations and organizations."

The reason underlying the authorities is thus stated in *Matter of Estate of Prime,* 136 N. Y., 347: "We are of the opinion that a statute of a state granting powers and privileges to corporations must, in the absence of plain indications to the contrary, be held to apply only to corporations, created by the state and over which it has power of visitation and control. . . . The Legislature in such cases is dealing with its own creations, whose rights and obligations it may limit, define and control." *U. S. v. Perkins,* 163 U. S., 625; *In re Rothschild's Est.,* 63 Atlantic, 615; *Davis v. Stevens,* 94 N. E., 556.

The courts of California and Kentucky have held that bequests to foreign, educational, or religious corporations are not subject to inheritance tax.

In re Estate of Marie Antoinette Fiske v. Princeton University, there was a legacy to the Princeton University, Cheshire Public Library and Cheshire Cemetery. The Court held that the legacy was not subject to inheritance tax. The California statute, under which the exemption was claimed, is referred to in the opinion. The statute is very broad and comprehensive. Indeed, *Wilbur, J.,* speaking for the Court, says:

"Our attention is not called to any law which is as broad and comprehensive in its scheme of exemption as our statute."

In case of *Sage's Executors v. Commonwealth,* 196 Ky., 257, the widow of Russell Sage gave the residue of her large estate to various educational institutions and charitable organizations, none of which was located in the State of Kentucky. The Kentucky statute, under which the exemption was claimed, was also broad and comprehensive. It provided in substance "that property of any amount bequeathed to . . . any person or persons, society, corporation, institution, or association, in trust for any of the purposes above mentioned, shall be exempt from such tax." In construing this statute the Court held that the legacies were exempt from inheritance tax.

In case of *Bingham's Administrator v. Commonwealth,* 196 Ky., 318, the Court considered the question, among others, as to whether or not legacies by Mrs. Bingham to the University of North Carolina and hospitals and churches located in Florida were subject to inheritance tax in the State of Kentucky. The Court held, upon authority of the *Sage case, supra,* that said legacies were not subject to inheritance tax.

The divergence of decision in the courts grows out of the construction of the various statutes applicable to the question. The North Carolina statute provides that no tax shall be imposed or collected on legacies passing to educational or charitable corporations "in this State." The words "in this State" must be construed in connection with the words "religious, educational or charitable corporations" in the sense of designating and specifying the institutions that the Legislature had in mind. In other words, the corporations referred to, falling within the exemption, are the corporations of this State, for the reason that our own institutions were the immediate objects of legislative solicitude in granting exemptions from inheritance tax.

We therefore hold that the legacies involved in this controversy are subject to inheritance tax, and the judgment is upheld.

Affirmed.

J. N. BRYANT v. SOUTHERN BOX AND LUMBER COMPANY.

(Filed 24 November, 1926.)

1. Contracts—Breach—Vendor and Purchaser.

Where the issues submitted in an action for damages for defendant's refusal to accept and pay for on delivery at his place of business 500,000 feet of unmanufactured logs, at any time between certain dates, about ten months apart: *Held,* by the terms of the written contract, expressing the full terms of agreement, the plaintiff was required to furnish the logs in reasonable quantities of each delivery within the stated period.

2. Contracts—Breach—Vendor and Purchaser.

Where the defendant has refused to accept and pay for logs to be furnished by plaintiff in reasonable quantities within a stated period, which the plaintiff at all times was able, ready and willing to deliver according to the terms of the agreement, and would have done so except for the defendant's refusal to receive them, it is a breach by defendant of his contract, entitling the plaintiff to damages.

3. Instructions—Contracts, Written—Interpretation—Questions of Law—Jury—Findings—Evidence.

Where the evidence is conflicting as to whether a written instrument fully expressed the agreement of the parties, or should be reformed in equity for mistake, or was subsequently modified by the parties, it is correct for the trial judge to construe the intentions of the parties as expressed in the written contract, hypothecated upon their findings as to the facts upon the questions involved.

4. Contracts—Breach—Damages—Vendor and Purchaser.

Damages sustained by the seller of logs by the purchaser's breach in refusing to accept them according to his written contract, are not too indefinite and remote when the time for delivery extends over a few months, at a price named, and there is definite evidence as to cost the seller would have incurred therein.

5. Judgments—Contracts—Vendor and Purchaser—Interest—Verdict.

Where the verdict of the jury has established the amount of the plaintiff's damages on defendant's breach of contract to accept and pay for upon delivery certain logs sold to him, to be delivered in reasonable quantities during a period of about ten months, the expiration of the delivery period expressed in the writing is the time for the payment for the logs, and it is not error for the judge to allow in the judgment rendered interest from that date, no specific date having been fixed by the verdict. *Mfg. Co. v. McQueen*, 189 N. C., 311, cited and distinguished.

APPEAL by defendant from judgment of *Midyette, J.*, at March Term, 1926, of NEW HANOVER. No error.

Civil action to recover damages for breach of written contract for sale and delivery of logs.

Plaintiff agreed to sell to defendant 500,000 feet of unmanufactured gum and other hardwood logs, as specified in the contract, and to deliver said logs to defendant between 7 June, 1920, and 1 April, 1921; defendant agreed to pay $32.50 per thousand feet for said logs, immediately upon each delivery.

Plaintiff alleges that he was ready, willing and able to perform said contract, but that defendant, prior to the expiration of the time for delivery of the logs, declined to pay for logs tendered by plaintiff and notified him that it would not accept or pay for any logs thereafter tendered by plaintiff in compliance with said contract.

Defendant denied the breach of the contract alleged in the complaint, and alleged by way of cross-action and counterclaim breach of

same by plaintiff, resulting in damages to defendant. Issues arising upon defendant's cross-action and counterclaim were answered by the jury against the contentions of defendant.

Issues determinative of plaintiff's action against defendant, and of the defense thereto, were answered by the jury as follows:

1. Was the contract between the parties for the sale of logs partly written and partly oral, and if so, did the oral part thereof provide for monthly deliveries of logs? Answer: No.

2. If not, was there a modification of the agreement after its execution, under and by the terms of which it was agreed that there should be a monthly delivery of the logs? Answer: No.

3. Did the plaintiff and defendant, as a part of their agreement, contract with each other that the logs should be delivered by monthly deliveries, and was such understanding through a mutual mistake of the parties omitted from the written contract? Answer: No.

4. Was there a breach of the contract by the defendant as alleged in the complaint? Answer: Yes.

5. What damages, if any, is plaintiff entitled to recover of the defendant? Answer: $2,250 with interest.

From judgment upon this verdict that plaintiff recover of defendant the sum of $2,250, with interest thereon from 1 April, 1921, and costs, defendant appealed to the Supreme Court.

K. O. Burgwyn and Herbert McClammy for plaintiff.
Bryan & Campbell for defendant.

CONNOR, J. The entire contract between plaintiff and defendant with respect to sale and delivery of the logs was in writing; no terms or conditions of their agreement were omitted from the written contract by the mutual mistake of the parties; nor was there any modification of said contract, with respect to the delivery of the logs, subsequent to its execution.

The court instructed the jury that under the agreement between the parties, as set out in the written contract, plaintiff had the right to deliver to defendant 500,000 feet of logs, as specified therein, at any time between 7 June, 1920, and 1 April, 1921, in such reasonable quantities and in such installments as plaintiff might elect, and that if the jury should answer all of the first three issues "No," and should find the facts to be as testified by all the witnesses, they should answer the fourth issue "Yes," but that if they answered either of the first three issues "Yes," they should answer the fourth issue "No." We find no error in these instructions. Defendant's assignments of error based upon exceptions to the instructions cannot be sustained. It is expressly provided in the written contract that defendant shall pay for

the logs "immediately upon each delivery." It is clear that the parties to this contract did not contemplate that the entire quantity of logs—500,000 feet—should be delivered by plaintiff or paid for by defendant at one time, but that deliveries should be made from time to time, between 7 June, 1920, and 1 April, 1921. In the absence of any agreement as to the quantity to be delivered at any one time, or as to the frequency of the deliveries, plaintiff was required only to deliver the logs in reasonable quantities and at reasonable times, between 7 June, 1920, and 1 April, 1921. Such deliveries would have been a full compliance by plaintiff with his contract. The instructions were predicated upon a finding by the jury that there was no agreement between the parties with respect to monthly deliveries which had been omitted from the written contract by the mutual mistake of the parties, or made by them orally at the time of its execution, as a part of the contract, or subsequently as a modification of the written contract. The jury having found that the entire contract was in writing, it was the duty of the court to construe the contract, and to instruct the jury as to the rights and obligations of the parties thereunder.

Plaintiff is not seeking in this action to recover of defendant for a partial performance by him of the contract; he alleges a breach of the contract by defendant and demands damages for such breach. It is not material to plaintiff's recovery, to decide whether the contract was, as defendant contends, entire and indivisible. Defendant, having declined to pay for logs tendered by plaintiff, in performance of his contract, and having notified plaintiff that it would not accept or pay for logs thereafter tendered by plaintiff, thereby breached its contract, and plaintiff was not required to prove performance by him of the contract thereafter in order to recover damages for defendant's breach. Plaintiff alleged and offered evidence to prove that he was ready, willing and able to deliver the logs, as he had agreed to do and thereby fully perform his contract with defendant. The jury having found the facts to be as alleged by plaintiff, he was entitled to recover of defendant his damages resulting from defendant's breach of the contract. *Edgerton v. Taylor*, 184 N. C., 571; *Ward v. Albertson*, 165 N. C., 218; *Bateman v. Hopkins*, 157 N. C., 470; *Gaylord v. McCoy*, 161 N. C., 685; *Hughes v. Knott*, 138 N. C., 105; *Blalock v. Clark*, 133 N. C., 306; *Grandy v. Small*, 50 N. C., 50.

The court correctly instructed the jury that the measure of damages for plaintiff's recovery in this action was the net profit which he would have made, had defendant performed its contract by accepting and paying for the logs—that is, the difference between the sum which he would have received for logs, containing 500,000 feet, if he had delivered same to defendant at $32.50 per thousand feet, the contract

price, and the sum which it would have cost him, as found by the jury, to deliver the logs. Such damages may fairly be supposed to have been in the contemplation of the parties, when they made the contract, and naturally resulted from its breach. Upon the facts of this case, the profit which plaintiff expected to make, and would have made but for defendant's breach, was reasonably certain. The only element as to which there was any uncertainty was the cost to plaintiff of delivering the logs. There was evidence from which the jury could readily ascertain this sum. The profit which plaintiff sought to recover was not too remote or speculative to be assessed by the jury. The time during which the logs were to be delivered was definite and certain, extending over only a few months. This fact distinguishes this case from the decision in *Wilkinson v. Dunbar,* 149 N. C., 20. Otherwise, the opinion in that case by *Hoke, J.*, sustains the instruction as to the measure of damages in the instant case.

The jury answered the fifth issue, "$2,250, with interest." No date was fixed by the jury from which interest on the amount assessed as damages was recoverable. The court adjudged that plaintiff recover interest from 1 April, 1921, the date on which, under the contract, the delivery of the logs would have been completed. Defendant excepts to the judgment in this respect, contending that it was error for the judge to determine the date from which interest was recoverable. This contention cannot be sustained. Under the instruction of the court, the jury found that the profit which plaintiff would have made between 7 June, 1920, and 1 April, 1921, was $2,250. If defendant had performed its contract, plaintiff would have received this sum prior to 1 April, 1921. As a result of the breach, plaintiff did not receive this sum, prior to said date. The amount of the damages was ascertained from the terms of the contract itself, and from evidence relevant to the inquiry as to the amount. *Perry v. Norton,* 182 N. C., 585; *Croom v. Lumber Co.,* 182 N. C., 217; *Chatham v. Realty Co.,* 174 N. C., 671. There was no error, upon the facts of this case, in adjudging that plaintiff recover interest from 1 April, 1921, on the amount fixed by the jury as the profit he would have received prior to said date. The decision in *Mfg. Co. v. McQueen.* 189 N. C., 311, is not determinative of defendant's contention, upon the facts of this case. In that case, it was held that where the jury had not fixed the date, it was error for the court to do so, although the jury's answer to the issue was, $2,995.17, with interest." The interest in that case ran over a long period of time; the amount recovered by plaintiff was damages for conversion by defendant of various sums of money belonging to plaintiff, and received by defendant as agent of plaintiff.

The judgment is affirmed. We find

No error.

ZEB. MATTOX v. THE SEABOARD INSURANCE COMPANY.

(Filed 24 November, 1926.)

Insurance, Accident—Automobiles — Stipulations in Policy — Waiver — Evidence.

The stipulations in an accident insurance policy upon an automobile that written notice of the accident be given the insured within a certain time, or upon failure of the parties to agree as to the amount of damages, they will arbitrate, etc., are deemed waived by the insurer upon denial of liability.

APPEAL from *Lane, J.*, at August Term, 1926, of UNION. Reversed.

Vann & Milliken for plaintiff.
John C. Sikes and John M. Robinson for defendant.

PER CURIAM. This action was instituted by plaintiff against defendant to recover upon a certain fire insurance policy on an automobile which was destroyed by fire on 17 December, 1925. This action was instituted on 5 January, 1926.

Plaintiff offered in evidence open Policy No. D-1004 of defendant—standard policy.

Defendant relied on certain provisions of the policy: (1) Notice in writing to the company within 60 days after loss or damage, giving in detail the facts, etc. (2) In case the assured and this company shall fail to agree as to the amount of loss or damage, each shall, on the written demand of either, select a competent and disinterested appraiser, etc. (3) The loss shall in no event become payable until sixty days after the notice, ascertainment, estimate and verified proof of loss herein required have been received by this company, and if appraisal is demanded, then, not until sixty days after an award has been made by the appraisers.

Plaintiff concedes "for the purpose of this appeal that unless there is evidence to go to the jury on an issue of the defendant's waiver of policy provisions in the respects mentioned, the judgment should be affirmed."

It is well settled in this State that a denial of liability waives the filing of proof and the time limit fixed in the policy, within which it became payable and action might at once be instituted. *Gerringer v. Insurance Co.*, 133 N. C., p. 407; *Higson v. Insurance Co.*, 152 N. C., p. 206; *Moore v. Accident Assurance Corporation*, 173 N. C., p. 532; *Proffitt v. Ins. Co.*, 176 N. C., p. 680.

The only question involved: was there any evidence to go to the jury as to defendant's denial of liability? We think there was. On a motion

to nonsuit, the evidence is to be taken in the light most favorable to plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.

The defendant, Zeb. Mattox, had loaned the car in controversy to Oscar Threatt. He testified that he was going to Lancaster, S. C., from Monroe. He did not know what caused the fire. Just below Waxhaw the lights went out and the car ran off the fill. He jumped out about the time it went in the creek and it was on fire. He was going around the curve at the creek when the lights went off and he made an effort to stop, and the first thing he knew the car was going down the embankment.

Zeb. Mattox testified in part: That between one and two weeks after the fire one Mercer, a representative of defendant company, came to see him about a settlement. Proof of loss had been filled out and sent to the company.

"Q. Now, Mr. Mattox, go ahead and tell what took place between you and Mr. Mercer when he came down there. A. I carried him out the Jackson Highway where the car was burned, and he looked it over, and he said that if the car run down the bank they wasn't liable, and the car was damaged by running down the bank and they wasn't liable for the damage to the car; that it was damaged by running down the embankment."

There was other testimony by plaintiff of an offer of $500 that he would not accept—offer coupled with a denial of liability.

On cross-examination:

"A. No, sir, he commenced trying to show me where the car had run down the bank and damaged the car, and he wasn't liable for the car.

"Q. What value did he place on the car before it was damged? You placed the value at $1,300? A. He didn't place any because he said they wasn't liable for the car at all.

"Q. And that he wasn't liable for the damage which had been done by reason of it running off the embankment? A. Said he wasn't liable for the car because it was damaged when it run off."

Defendant in its answer says that it "did not then, never has and does not now deny that it is liable on the open policy," etc.

Conceding, without deciding that this question may be raised by the pleadings, yet we think the evidence is sufficient to be submitted to a jury as to whether the stipulation has not been waived by the defendant.

The judgment of nonsuit is

Reversed.

WILL T. YELVERTON ET AL. v. WILL E. YELVERTON ET AL.

(Filed 1 December, 1926.)

Wills—Devise—Lands—Estates—"Heirs at Law"—Descent and Distribution—Personalty.

Where the testatrix has died leaving her surviving no husband, nor lineal descendants, nor father, nor mother, nor brother, nor sister, nor issue of such, and has by the express terms of her will devised certain residue in her lands, transmitted by descent from her father, to her "heirs at law," these heirs taking under the same tenure the same quality and quantity of the estate, acquire the lands as if transmitted to them under the Fourth Canon of Descent, and not as purchasers under the will, and are to be determined by their being of the same blood of the transmitting ancestor, the father, in exclusion of the collateral relations of the testatrix on her mother's side. As to personalty so devised, the next of kin would take under the statute of distribution.

CIVIL ACTION, before *Cranmer, J.*, at August Term, 1926, of WAYNE.

The action was commenced for the partition of 222½ acres of land belonging to Mary Emma Aycock, who died on 14 February, 1925. There was an answer filed in the proceeding raising an issue, and the cause was transferred to the Superior Court. In the Superior Court there was an agreed statement of facts, which may be briefly recapitulated as follows:

1. Mary Emma Aycock died in Wayne County on 14 February, 1925, leaving a last will and testament, which, together with the codicil thereto, was duly admitted to probate and admitted to be the last will and testament of said testatrix.

2. Mary Emma Aycock, at the time of her death, left her surviving no husband, nor lineal descendants, nor father, nor mother, nor brother, nor sister, nor issue of such.

3. The plaintiffs are lineal descendants of deceased brothers and sisters of the mother of said testatrix, Mary Emma Aycock, and are the next collateral relations, capable of inheriting of said Mary Emma Aycock, who are of the blood of the mother of said Mary Emma Aycock.

4. The answering defendants are lineal descendants of deceased brothers and sisters of the father of said Mary Emma Aycock, and are the next collateral relations, capable of inheriting of said Mary Emma Aycock, who are of the blood of the father of said Mary Emma Aycock.

5. That besides real estate situated in the town of Fremont and devised to Will T. Yelverton, the only other real estate of which the said Mary Emma Aycock died seized and possessed, was a farm of 222 acres, which said farm was transmitted to the said Mary Emma Aycock by descent from her deceased father, Jonathan T. Edgerton.

The will of Mary Emma Aycock is as follows: "I, Mary Emma Aycock, of the town of Fremont, State of N. Carolina, declare this to be my last will and testament.

At my death it is my will that all my just debts and all expenses for my burial and burying grounds, which includes a proper burial, correct engraving on tombstone, erecting marble head and foot slab to grave, and all other necessary work for neatness and completion be paid out of my estate.

I intrust to Memorial Church (Baptist faith) in Wayne County, of which my parents were members, the keeping of the sum of one thousand dollars, to be loaned out and interest used to keep up the graves or burying places of my father and mother, myself and husband, and our two children, six in all, in neat, clean, decent order, the names of whom may be found on tombstones as follows, in the Aycock burying ground near what is called Hook's Crossing, about one-half mile, more or less, on east side of W. & W. R. R., my husband's old home: Eld. J. T. Edgerton and wife, Penelope; J. W. Aycock and wife, Emma, and our two little children, Jonathan B. and Mary Leila, all in the same row. When the above request is carried out, work paid for, and the said church paid for its trouble, the remainder should there be any, I desire to be used for the benefit of said church, or their pastor. I give and bequeath to said Memorial Church the sum of one thousand dollars, to be loaned out and interest used for the benefit of said church, in whatever way the church thinks best and proper, to have and to hold the same unto the said Memorial Church forever. I desire that the note of three hundred dollars and interest held against Oscar and Arthur Hooks be canceled forever.

I give, devise and bequeath to my cousin, Will T. Yelverton, his heirs and assigns all my real estate, hardware stock, bank stock and house furnishings in the said town of Fremont, except my fancy quilts and homemade counterpanes; these I wish divided between Hettie Bell Yelverton, Lillian Wiggins, Serena Peacock and Flora Hooks, except one quilt which is to be Mary P. Farmer's, provided himself and family, or family, live with, care for, and kindly treat me the remainder of my life, and seeing to it that I have a proper and suitable burial, otherwise the above statement is to be annulled.

One-half of all my other estate, both real and personal, I give, devise and bequeath in equal shares to the said Will T. Yelverton, and my uncle, H. F. Yelverton, their heirs and assigns forever.

All the rest, or other half, residue and remainder of my real and personal estate, I give, devise and bequeath to my heirs at law.

All just debts, all tombstone work and engraving and all other necessary expenses for my burial and burying ground must all be completed

and paid for before any of my estate, either real or personal be divided or interfered with.

I appoint my said uncle, H. F. Yelverton, and the said Will T. Yelverton executors of this my will and desire that they shall not be required to give any security for the performance of their duties.

In witness whereof, I, Mary Emma Aycock, have hereunto set my hand and seal this 8 January in the year of our Lord nineteen hundred and twenty. Mary Emma Aycock. (Seal.) Frank Watson, Cutler Lee."

Codicil: "I, Mary Emma Aycock, of the town of Fremont, State of North Carolina, declare this to be the codicil to my will, and is my last will and testament.

The portion or share made in my will to my uncle, H. F. Yelverton (now deceased), I give, devise and bequeath in equal shares to his son, Will E. Yelverton and Lillian Wiggins, their heirs and assigns forever.

In witness whereof, I, Mary Emma Aycock, have hereunto set my hand and seal this 6 October, in the year of our Lord nineteen hundred and twenty-one. Mary Emma Aycock. (Seal.)"

The judgment of the court was as follows: "This cause coming on to be heard before his Honor, E. H. Cranmer, Judge Presiding, upon an agreed statement of facts, it is considered and adjudged by the court:

(1) That under the provision, 'all the rest, or other half, residue and remainder of my real and personal estate, I give, devise and bequeath to my heirs at law,' contained in the will of Mary Emma Aycock, all the rest, or other half, residue and remainder of the 222-acre farm referred to in said agreed statement of facts, and the proceeds of the sale thereof, pass to the next collateral relations, capable of inheriting, of the said Mary Emma Aycock, who are of the blood of her father, and also to the next collateral relations, capable of inheriting, of the said testatrix, who are of the blood of her mother.

(2) That in the distribution of the proceeds of the rest, or other half, residue and remainder of the said Mary Emma Aycock's real estate, Will T. Yelverton, Will E. Yelverton and Lillian Wiggins, the first half of the said real estate having been devised to them in a former item, and the said specific devises and bequests having been made to the said Will T. Yelverton, receive their proportionate part of the other half of said real estate.

(3) That in the distribution of the proceeds of the rest, or other half, residue and remainder of said Mary Emma Aycock's personal estate, the said Will T. Yelverton, Will E. Yelverton and Lillian Wiggins, the first half of said personal estate having been bequeathed to them in a former item, and the said specific devises and bequests having been made to the said Will T. Yelverton, receive their proportionate part of the other half of the said personal estate.

It is further considered and adjudged by the court that the costs of this action be paid out of the fund arising from the sale of the said real estate." E. H. CRANMER, *Judge Presiding.*"

W. A. Finch and J. S. Manning for plaintiffs.
Dickinson & Freeman and Langston, Allen & Taylor for defendants.

BROGDEN, J. Two questions are presented for determination:

1st. Who are the heirs at law of the testatrix, Mary Emma Aycock, with respect to the 222-acre farm, under the clause of the will devising "all the rest, or other half, residue and remainder of my real and personal estate, I give, devise and bequeath to my heirs at law?"

2d. Who are the heirs at law of the testatrix, Mary Emma Aycock, with respect to her personal property?

The term "heirs at law," so far as real estate is concerned, signifies those who would have taken or been entitled to the property had the testatrix died intestate; or, in other words, "an heir at law" is the one upon whom the law casts inheritance. *Carroll v. Mfg. Co.*, 180 N. C., 367; *Reid v. Neal,* 182 N. C., 192. In order to answer the first question arising upon the record it is necessary to determine whether the "heirs at law" take by descent or by purchase under the will. If the heirs at law take by purchase under the will of the testatrix, then the judgment in this case is correct; but, if they take by descent, the judgment must be reversed.

The plaintiffs contend that the "heirs at law" would take as purchasers under the will, and therefore the next collateral relations of both the blood of the father and mother of the testatrix would take the property. What is purchase in law? "Purchase in law denotes the acquisition of an estate in lands by a man's own agreement or act in contradistinction to acquisition by descent from an ancestor. The popular signification of the word purchase, i. e., to buy, falls far short of the comprehensive meaning given to the word by the law. If land be given to a man by deed or will, in fee or in fee tail, he is a purchaser. But there is this distinction in the case of a gift by will: If the ancestor devised his whole estate to his heir at law in the identical manner in which it would have descended to the heir if no devise had been made, the heir takes by descent and not by purchase. But he must take the same estate and in the same subject-matter to come under the rule." Mordecai's Law Lectures, vol. 1, 648.

In the case of *Campbell v. Herron,* 1 N. C., 386, the Court holds that, "It is not doubted, but that if a person devises land to one who is his next heir, and his heirs, the devise is void, and the heir shall take by descent; or if a testator devise that his lands shall descend to his son, the devise is void, and the devisees shall be in by descent."

In *M'Kay v. Hendon,* 7 N. C., 211, *Taylor, C. J.,* says: "If a man devise his land to his heirs without changing the tenure or quality of the estate, the heirs are in by descent; and in all cases where they take the same estate by will, which they would have taken if the ancestor had died intestate, the law is the same."

In *Wilkerson v. Bracken,* 24 N. C., 315, *Ruffin, C. J.,* says: "As the devise from John Bracken to his daughter did not change the nature and quality of the estate, which she would have taken had he died intestate, she took by descent and not by devise; according to the well-known preference of the common law for the title of descent." *Kiser v. Kiser,* 55 N. C., 28.

In the case of *Poisson v. Pettaway,* 159 N. C., 650, *Brown, J.,* plants the decision upon the *Bracken case* and states the principle thus: "At common law, a devisee who takes the same quality and nature of estate under the will as he would have taken by descent had the testator died intestate, takes by descent, owing to the preference of the common law for the title of descent. Our statute puts a similar devise between such parties on the same footing with the descent." The *Poisson case, supra,* is cited with approval in *Dixon v. Pender,* 188 N. C., 792.

These decisions are referred to in order to show that for more than one hundred years it has been the law in this State that if a devisee under a will takes the same quality and nature of estate as he would have taken if the testator had died intestate, he is in by descent and not by purchase.

But do the "heirs at law" referred to in the will of Mary Emma Aycock, take the same quality of estate and by the same tenure as if she had died intestate? Black's Law Dic. defines the quality of an estate as follows: "The period when, and the manner in which, the right of enjoying an estate is exercised. It is of two kinds: (1) The period when the right of enjoying an estate is conferred upon the owner whether at present or in future; and (2), the manner in which the owner's right of enjoyment of his estate is to be exercised, whether solely, jointly, in common, or in coparcenary."

The "heirs at law" of Mary Emma Aycock, under the devise in question, take a present estate in fee simple as tenants in common. If Mary Emma Aycock had died intestate with respect to this particular farm, her heirs at law would take a present estate in fee simple as tenants in common. Therefore, the "heirs at law" of the testatrix, having taken under the devise the same quality of estate and the same tenure that they would have taken if she had died intestate, take by descent and not by purchase.

Now, if the "heirs at law" take by descent, certainly it must follow that the statute of descents would govern the devolution of the property.

As it appears that the testatrix, Mary Emma Aycock, at the time of her death, left her surviving, no husband, nor lineal descendants, nor father, nor mother, nor brother, nor sister, nor issue of such, the fourth canon of descent would apply. This canon or rule is as follows: "On failure of lineal descendants, and where the inheritance has been transmitted by descent from an ancestor, or has derived by gift, devise or settlement from an ancestor, to whom the person thus advanced would, in the event of such ancestor's death, have been the heir or one of the heirs, the inheritance shall descend to the next collateral relations, capable of inheriting, of the person last seized, who were of the blood of such ancestor, subject to the two preceding rules." The reason for adopting the fourth canon is given by *Gaston* and appears on the Journal of the House of Commons of North Carolina in the proceedings had on Friday, 8 December, 1808, and is thus stated: "The fourth rule has for its principal object the securing to the family of the man, by whose industry the property was acquired, the enjoyment of such property, in preference to those who have no consanguinity with it." *Wilkerson v. Bracken,* 24 N. C., 323.

The record discloses that this farm in controversy descended to the testatrix, Mary Emma Aycock, from her father, Jonathan T. Edgerton. Therefore, if Mary Emma Aycock had died intestate, this farm would vest in her heirs at law who were of the blood of such transmitting ancestor, to wit, Jonathan T. Edgerton. As the testatrix devised "all the rest, or other half, residue, and remainder" of her real estate and personal property to her "heirs at law," then, of necessity, one-half of this farm would belong to and vest in, the answering defendants, who are the next collateral relations, capable of inheriting, of the said Mary Emma Aycock, who are of the blood of Jonathan T. Edgerton, the transmitting ancestor. As the land has been sold and converted into money, without prejudice, the proceeds would, in law, be deemed realty. *Gillespie v. Foy,* 40 N. C., 280.

Dean Mordecai, in his Law Lectures, vol. 1, p. 648, points out an exception as follows: "Thus, if a man owns two tracts of land and devises one tract to A and the other tract to B—A and B being his heirs—the rule does not apply." This exception is based upon the case of *Raiford v. Peden,* 32 N. C., 466, in which *Justice Pearson* says: "If there be two coheirs and one tract of land is devised to one, and another tract to the other, they take by devise and not by descent, for under the devise each has an estate in severalty in the respective tracts; whereas, by descent, each would have had an undivided moiety in the whole." Sheph. Touchstone, 451. But this exception does not apply to the case now under consideration, because one-half of the residuary estate, including the farm, is given to Will T. Yelverton, Will E. Yel-

verton and Lillian Wiggins, and "the rest, or other half" is given to the "heirs at law" of the testatrix. The "heirs at law," therefore, would have an undivided moiety in said farm with the devisees named.

The plaintiffs rely upon the case of *Kirkman v. Smith,* 174 N. C., 603. The devisor in that case was D. W. Flow, and the devise was "to Margaret G. Kirkman . . . to be hers, her lifetime, and then to go to Guy Kirkman and Marvin Kirkman, and if they should die without any bodily heirs, the said land to go back to the Flow heirs." Marvin Kirkman died intestate and unmarried, leaving no issue or lineal descendants. Guy Kirkman married and had children. Margaret Kirkman and Guy Kirkman made a contract to sell the land to defendants, who refused to take it upon the ground that the said plaintiffs could not convey an absolute title in fee simple. *Justice Walker* held that rule four of the Canons and Descent had no application for the reason that "said rule is confined to cases where there is no other disposition of the property by will which would interfere with the prescribed course of descent." This reasoning is sound and correct because the will devised the property to the Flow heirs upon the contingency that the Kirkmans should die without any bodily heirs. This devise, therefore, interfered with the prescribed course of descent, and hence the devisees thereunder took by purchase.

Our case is essentially different, and the principle enunciated in *Kirkman v. Smith* does not apply.

We hold, therefore, that as to "all the rest, or other half," "residue and remainder," the "heirs at law" who are the blood of Jonathan T. Edgerton, would be entitled to one-half of the net proceeds of said farm.

It appears that there was certain personal property undisposed of. The "heirs at law," with respect to personal property would be her next of kin as designated by the statute of distribution. *Everett v. Griffin,* 174 N. C., 106.

Reversed.

BURLINGTON HOTEL CORPORATION v. W. A. BELL.

(Filed 1 December, 1926.)

1. Corporations—Subscriptions—Shares of Stock—Statutes—Contracts—Fraud—"Blue-Sky" Law.

C. S., 6363, requiring that for the sale of certificates of stock the person or corporation offering them shall be licensed by the Insurance Commissioner, applies to sales of stock in a domestic corporation as well as a foreign one, irrespective of whether the same was either fraudulently procured or falls within the intent and meaning of the "Blue-Sky" law.

2. Same—Actions.

Where a subscription contract for purchase of shares of stock in a corporation was procured by one unauthorized by the provisions of C. S., 6363, 6367, or one who has not obtained a license from the Insurance Commissioner, the contract is not enforcible against such subscriber.

3. Same—Commissions—Principal and Agent.

One who sells certificates of shares of stock in a corporation upon a commission basis without having obtained a license to do so as required by C. S., 6363, 6367, comes within the inhibition of the statute, though the sale may have been effected by another acting through such solicitor without compensation. As to whether one thus acting upon commission will be regarded as an agent, *Quere?*

APPEAL by plaintiff from judgment of *Nunn, J.*, at May Term, 1926, of ALAMANCE. No error.

Action upon subscription agreement for purchase of stock of plaintiff corporation.

The jury found, in response to an issue submitted by the court, that the agreement to purchase said stock was not procured by fraudulent misrepresentations as alleged in the answer.

The court was of opinion that upon the statement of agreed facts, plaintiff was not entitled to recover, for that the subscription agreement was not in compliance with C. S., 6363 and C. S., 6367. From judgment upon the verdict and the agreed facts, plaintiff appealed to the Supreme Court.

Brooks, Parker & Smith, and Coulter, Cooper & Carr for plaintiff.
John J. Henderson for defendant.

CONNOR, J. The only question presented by this appeal is whether C. S., 6363 and C. S., 6367 are applicable in this case. It is admitted that the subscription agreement, although in writing and signed by defendant, did not comply with C. S., 6367, and that neither plaintiff, nor its agent, by whom said subscription agreement was procured, was licensed in accordance with the provisions of C. S., 6363. No error is assigned upon this appeal with respect to the finding by the jury that the subscription agreement was not procured by fraudulent misrepresentations, as alleged in the answer. If the statutes are applicable, the judgment must be affirmed.

It is provided by C. S., 6363, which was in force when the subscription agreement was signed by defendant, that no corporation shall, by its agents offer for sale, or sell stock of a corporation, whether foreign or domestic, in this State, unless it has been licensed to do so by the insurance commissioner, as provided in said statute.

The Hockenberry System, Inc., a foreign corporation, was employed by plaintiff, a domestic corporation, as its agent to sell its stock; as such agent it procured the subscription agreement, signed by defendant, upon which this action is brought, and received commissions from plaintiff for procuring said agreement. It is agreed, "that neither the Burlington Hotel Corporation, nor the Hockenberry System, Inc., applied to the Insurance Commissioner of the State of North Carolina for license to transact business in this State, nor were any of the agents or representatives of either corporation licensed to transact business in the State by the Insurance Commissioner of the State of North Carolina, nor was such matter taken up with the Insurance Commissioner." While it may be doubted whether the contract between the Burlington Hotel Corporation and the Hockenberry System, Inc., as set out in statement of agreed facts, constituted the Hockenberry System, Inc., the agent of plaintiff for the sale of stock, the parties hereto have agreed that the said Hockenberry System, Inc., was employed to sell stock and received a commission for the sale of stock to defendant. We therefore concur with the opinion of Judge Nunn that C. S., 6363 is applicable to the transaction disclosed by the record. It appears from the facts agreed upon in this case that the Hockenberry System, Inc., did more than make a survey of conditions in the town of Burlington relative to the building of a hotel in said town; its activities were not confined to conducting an intensive campaign among its citizens to raise funds for building a hotel, as a community enterprise. It was employed to sell stock of plaintiff corporation, and sold stock to defendant. It received from plaintiff a commission for making said sale. C. S., 6363 is therefore applicable.

It is provided in C. S., 6367 that no person, as principal or as agent, shall sell or agree to sell within this State stock of a corporation, unless the contract of subscription or sale shall be in writing, and contain the words set out in the statute with reference to commissions to be paid for procuring such subscription or making such sale. This statute is clearly applicable to the subscription agreement upon which plaintiff has sued defendant in this action. It appears from the subscription agreement set out in the statement of agreed facts, and which is in writing, that there was a failure to comply with the statute, for no reference is made therein to commission to be paid by plaintiff to its agent, the Hockenberry System, Inc., for procuring the subscription agreement of defendant. Plaintiff had agreed to pay and did pay such commissions on the sale of stock to defendant. It is true that it is stated that the contract for defendant's subscription was taken by a citizen of Burlington who was one of the group of workers, who served without compensation. This fact, however, cannot affect the decision

of the question here presented, for it is agreed that the Hockenberry System, Inc., received commissions upon this stock subscription, in accordance with its contract with plaintiff.

This Court has held that there can be no recovery by a party thereto upon a contract for the sale of stock of a corporation where such contract does not comply with C. S., 6363 or C. S., 6367. It is true that we said in *Bank v. Felton,* 188 N. C., 384 (opinion by *Clarkson, J.*), that the purpose and intent of the act is to prohibit organizers and promoters, whether foreign or domestic, who organize and promote the sale of what is commonly known as "blue-sky stock" from doing business in this State without complying with the statutes. We quoted with approval from *S. v. Agey,* 171 N. C., 831, the statement that "The intent of the statute is to protect our people, under the police power, from fraud and imposition by irresponsible nonresident parties." By subsequent amendment, the statute is now applicable to sales made by residents of the State as well as by nonresidents. We feel assured that these statutes and decisions by this Court in cases in which they were applicable, have been effective for the accomplishment of the purpose and intent of the General Assembly. It cannot be held, however, that they are restricted to sales of stock, which are commonly known as "blue-sky stock," or to sales made or procured by fraud. The jury in this case has found that there was no fraud in procuring the stock subscription from defendant. It is conceded that the stock of plaintiff corporation has none of the characteristics of "blue-sky stock." This, however, cannot affect the applicability of these statutes as they are now written to subscription agreements for stock in corporations, organized or to be organized, procured by agents, who receive commissions, or compensation for procuring said agreements.

In *Phosphate Co. v. Johnson,* 188 N. C., 419, we approved the principle, as applicable to these statutes, that if an act is prohibited by statute, an agreement in violation of the statute is void, although the act is not penalized, for it is the prohibition, and not the penalty, which makes the act illegal. It is immaterial whether the thing forbidden is *malum in se* or merely *malum prohibitum.* No distinction is recognized in this State between contracts which are evil in themselves and contracts which are unlawful only because prohibited by statute. *Annuity Co. v. Costner,* 149 N. C., 294. Whether it is a wise policy to require corporations such as the plaintiff, to comply with these statutes, is for the General Assembly and not for this Court to determine. If it shall be thought that C. S., 6363 and C. S., 6367, enacted by the General Assembly in the exercise of the police power of the State, for the protection of the public from an admitted evil, should be restricted so

that they will not apply to corporations, organized under the laws of this State, for legitimate purposes, who offer their stock for sale, in good faith, relief must be sought from the General Assembly. These statutes as amended, are applicable upon the agreed facts in this case. The judgment must be affirmed.

No error.

G. F. HAMBLEY ET AL. v. H. W. WHITE & COMPANY ET AL.

(Filed 1 December, 1926.)

Attachment—Courts—Jurisdiction—Levy—Actions.

Where there are several actions in attachment brought in our courts of general jurisdiction to subject thereto the same moneys of the same defendant, the court first acquiring jurisdiction by levy determines the priorities of the claimants, while the actions in the other jurisdictions continue for the purpose of establishing the claims of each of the plaintiffs against the defendant therein, also involving and determining the question of title; *S. c., ante*, 31.

APPEAL by several of the defendants from order of *McElroy, J.*, entered at the September Term, 1926, of ROWAN, as follows:

"Upon motion of counsel for the First National Bank of Jackson, Tenn., heretofore under former order of this court made a party defendant to this cause, and without prejudice to any order or orders heretofore made or any action or actions heretofore taken in this cause:

"It is ordered, that the Spray Cotton Mills, having its principal place of business at Spray, in Rockingham County, N. C., the Leward Cotton Mills, having its principal place of business in Randolph County, N. C., the Randolph Mills, Inc., having its principal place of business in Randolph County, N. C., the Arista Mills, having its principal place of business in Forsyth County, and Wenonah Mills, having its principal place of business in Davidson County, be, and they are hereby made and set down as party defendants in this cause, and the clerk of this court is hereby ordered forthwith to issue summons to each and every of the corporations above named in the usual form in which summons is issued from this court.

"It is further ordered that the injunction or restraining order heretofore issued in this cause by his Honor, Judge Henry P. Lane, at a former term of this court, shall continue and be in force and effect in all of its terms and provisions, the court being of the opinion that the true construction of the opinion or decision of the Supreme Court of North Carolina in the case of *Hambley & Co. v. White & Co.*, is that the several plaintiffs in the cases heretofore instituted against H. W.

White & Co., in the counties other than this county are restrained from proceeding in their several counties or courts to the trial of any other issue than the issue involved in each of said cases between the plaintiff therein and the defendants, H. W. White & Co., and are restrained from any further proceedings in so far as the title or ownership to the funds derived from the two sight drafts attached in this cause by the plaintiffs, Hambley & Co., are concerned.

"As upon a special appearance, the Spray Cotton Mills, The Leward Cotton Mills, the Randolph Mills, Inc., the Arista Mills and the Wenonah Mills each object and except to the foregoing order, and give notice of appeal to the Supreme Court.

"It is agreed between counsel that the case on appeal to the Supreme Court shall be made up of the transcript of the record on the former appeal, this order or judgment and the summons issued hereunder, together with any pleadings filed since the record in the former appeal was made up."

Manly, Hendren & Womble and Ivie, Trotter & Johnston for Spray Cotton Mills.

J. A. Spence for Leward Cotton Mills and Randolph Mills, Inc.

Craige & Craige for Arista Mills.

Raper & Raper for Wenonah Mills.

Royster & Royster and Hobgood & Alderman for First National Bank of Jackson, Tenn.

J. H. Burke for Bank of Alexander.

Clement & Clement and R. Lee Wright for Second National Bank of Tennessee.

STACY, C. J. The appeal presents the single question as to whether the trial court has correctly interpreted the decision rendered in this case at the Spring Term, 1926. *Hambley & Co. v. White & Co., ante*, 31.

Reference may be had to the case as first reported, for a full statement of the facts, as well as for the opinion, which has now become the law of the case. *Strunks v. R. R.*, 188 N. C., 567.

Each of the suits instituted by appellants is to be tried and prosecuted to judgment in the county of its rightful origin. This necessarily means that the garnishee must answer in each suit in the county of its institution or else run the risk of having judgment entered as provided by C. S., 820. It also means that the question of title to the property attached must be determined in each suit in the county of its origin, for in attachment, without personal service, this is a matter upon which jurisdiction depends. The fact that the question of title may be decided one way in some of the counties and differently in others is no

valid reason for denying to the present appellants the right to bring suit in their respective counties. Nor is venue to be controlled by the convenience of interveners. The question of priority is the only one to be determined in Rowan Superior Court so far as the rights of appellants are concerned. For this purpose, it was proper to order that they be made parties defendant herein, but it was error to restrain them from proceeding plenarily in their respective counties to try the title or ownership to the funds derived from the two sight drafts, the subject of attachment in all the suits.

Let the cause be remanded for further proceedings not inconsistent with this opinion and the opinion heretofore rendered.

Error.

C. F. HELDERMAN ET AL. v. HARTSELL MILLS COMPANY, INC.

(Filed 1 December, 1926.)

1. **Judgments Set Aside—Excusable Neglect—Meritorious Defense.**

A judgment by default for the want of an answer after the time therefor has elapsed as the statute requires, will not be set aside unless the defendant shows a meritorious defense, as well as excusable neglect.

2. **Same—Facts Found—Request of Parties.**

Where the defendant moves to set aside a judgment rendered against him for failure to answer, etc., for surprise, excusable neglect, etc., it is the duty of the judge to find the facts upon the evidence on which he bases his conclusions of law, at the request of the parties.

3. **Same—Appeal and Error—Conclusions of Facts Found—Questions of Law—Review.**

Where the trial judge has found the facts upon supporting evidence from which he has drawn his conclusions of law, allowing defendant's motion to set aside a judgment for excusable neglect, the facts so found are conclusive on appeal, but the legal conclusions therefrom are reviewable thereon.

4. **Judgments Set Aside—Attorney and Client—Neglect of Attorney—Excusable Neglect—Questions of Law—Appeal and Error.**

Where the defendant in an action has retained an attorney for his defense, of high character and reputation for diligence and faithfulness in the practice of his profession, with instructions to employ an attorney local to the litigation, and has fully relied on him to notify him of the steps necessary to be taken in his defense, and seeks to set aside a judgment by default therein entered against him for his failure to answer, the laches of the attorney, if any, nothing else appearing, is not attributable to the defendant and the order of the Superior Court setting aside the judgment for his excusable neglect when otherwise correct will be sustained on appeal. C. S., 600.

5. **Same—Meritorious Defense—Judgment by Default Final—Questions for Jury.**

Where upon defendant's motion to set aside a judgment by default final for excusable neglect, it appears of record on appeal to the Supreme Court that an issue of fact for the jury was raised, a meritorious defense is shown as a matter of law, and the judgment of the Superior Court allowing the defendant's motion will be sustained.

6. **Contracts—Vendor and Purchaser—Instructions to Deliver—Reasonable Time—Issues—Questions for Jury.**

Where a contract entered into between the vendor and purchaser of merchandise is that the former should ship the merchandise at the latter's request, and the defense to an action thereon is that the vendor shipped the goods without the purchaser's instructions, an issue of fact is raised for the determination of the jury as to whether the purchaser delayed giving his instructions beyond a reasonable time.

STACY, C. J., and ADAMS, J., dissenting.

APPEAL by plaintiffs from order of *Lane, J.*, affirming order of clerk of Superior Court of ROCKINGHAM County, setting aside judgment herein for excusable neglect. Affirmed.

Summons in this action was issued by the clerk of the Superior Court of Rockingham County on 12 September, 1925, and duly served on defendant in Cabarrus County on 17 September, 1925. Plaintiffs filed their verified complaint on 15 September, 1925. No demurrer or answer was filed thereto on or before the return day fixed in the summons, nor was any request made by defendant for extension of time within which to file demurrer or answer. On 26 October, 1925, upon motion of plaintiffs, judgment by default final was rendered by the clerk of the Superior Court.

On 14 December, 1925, defendant appeared for the first time before the clerk and moved that the judgment be set aside and that it be granted time within which to file answer, assigning as grounds for the motion:

1. That the clerk was without power to render judgment by default final upon the cause of action set out in the complaint.

2. That the failure of defendant to file answer to the complaint within the time prescribed by law was due to its excusable neglect.

3. That defendant has a meritorious defense, both in law and in fact, to the cause of action set out in the complaint.

From the order of the clerk, dated 19 December, 1925, allowing the motion, plaintiffs appealed to the judge of the Superior Court. Upon the hearing of this appeal at February Term, 1926, the judge affirmed the order of the clerk. Plaintiffs excepted and appealed to the Supreme Court.

A. W. Dunn and Humphreys & Gwyn for plaintiffs.
P. W. Glidewell and J. M. Sharp for defendant.

CONNOR, J. Referring to motions similar to that made in this action by defendant, *Justice Varser*, in *Lumber Co. v. Chair Co.*, 190 N. C., 437, says: "In these motions the Court cannot lose sight of the rights of the party who has been diligent, and has sought his remedy according to the course and practice of the Court. If there is hardship as between the parties, it must be borne by him who was not diligent, unless the facts come within the purview of C. S., 600." A judgment will not be set aside unless the party seeking relief under the statute, alleges and shows not only excusable neglect, but also a meritorious defense. In *Taylor v. Gentry, ante,* 503, *Stacy, C. J.,* says: "It is useless to set aside a judgment where there is no real or substantial defense on the merits. *Land Co. v. Wooten,* 177 N. C., 248; *Crumpler v. Hines,* 174 N. C., 283; *Norton v. McLaurin,* 125 N. C., 185." It is the duty of the judge, upon the request of either party to find the facts upon which he makes his order, allowing or disallowing the motion. *Holcomb v. Holcomb, ante,* 504.

The clerk of the Superior Court first found the facts upon which he made the order, setting aside the judgment theretofore rendered by him. Upon plaintiffs' appeal from this order, the judge found additional facts, and affirmed the order of the clerk. There was evidence in support of these findings of fact. They are, therefore, conclusive upon the appeal of plaintiffs to this Court. Whether the conclusions from these facts, to wit, that defendant's neglect to file an answer within the time prescribed by law was excusable, and that defendant has a meritorious defense to plaintiff's action as set out in the complaint, are correct, is a matter of law, and therefore reviewable upon appeal to this Court. For the principles of law applicable, see opinion of *Walker, J.,* in *Lumber Co. v. Cottingham,* 173 N. C., 323. The statement of these principles by *Clark, C. J.,* in *Norton v. McLaurin,* 125 N. C., 185, is quoted and approved.

It is found as a fact that defendant purchased of plaintiffs a fixed number of articles to be manufactured by plaintiffs, agreeing to pay therefor a stipulated price per article; that by the terms of the contract, these articles were not to be shipped by plaintiff or delivered to defendant until such times as defendant might thereafter request; that plaintiffs shipped the articles to defendant, without any request from defendant and that defendant declined to accept the articles. Conceding that defendant was required to make the request within a reasonable time, whether a reasonable time had elapsed since the date of the order, is a question for the jury; and if the jury shall find that plaintiffs shipped

the articles to defendant, without request from defendant, and before the lapse of a reasonable time, plaintiffs cannot recover in this action the purchase price of the goods shipped.

It is further found as a fact that defendant immediately upon the service of summons retained an attorney at law residing in Cabarrus County to defend the action; that said attorney at law upon his suggestion, was authorized by defendant to retain an attorney at law residing in Rockingham County to aid in the defense of the action; that defendant relied upon said attorney to defend the action and to retain a local attorney to aid him; that said attorney at law failed to retain a local attorney to aid him in the defense and failed to enter an appearance for defendant in the Superior Court of Rockingham County, or to file an answer to the complaint; that from the date on which said attorney was retained, until after the judgment by default final was rendered, the said attorney was not well and during said time was greatly distressed by the continued illness of his only son who was in a hospital at Charlotte, necessitating his absence daily from his office; that as soon as defendant was advised of the rendition of the judgment, it caused the motion to be made that the judgment be set aside. Said attorney did not communicate with or advise defendant further after he had been retained to defend the action. Defendant relied upon said attorney not only to take such steps as were necessary to make its defense, but also to advise what was required of defendant.

Whether the neglect of the attorney to file the answer was upon the facts found, excusable, is not determinative of defendant's right to relief upon its motion; defendant having retained an attorney well known to it, for his high character and excellent professional standing, had the right to assume that he would advise it when and what action was required of it for making its defense. Upon the facts found, the conclusion that defendant's negligence was excusable, cannot be held to be error. The negligence of the attorney, upon the facts found, even if conceded, will not be imputed to defendant, who was free from blame. *Edwards v. Butler*, 186 N. C., 200. C. S., 600, is a highly remedial statute; the relief authorized by the statute ought not to be denied where, as in this case, plaintiffs' rights, if any he has, cannot ultimately suffer, and defendant has a meritorious defense, which he seeks only an opportunity to make, and which he would, but for the statute, lose through his mistake, inadvertence, surprise, or excusable neglect. Plaintiffs have been diligent, but defendant's neglect to file an answer was upon all the facts, excusable. The order is

Affirmed.

STACY, C. J., and ADAMS, J., dissenting.

SARAH V. BENTON v. MARTHA J. BAUCOM AND HUSBAND, H. M. BAUCOM.

(Filed 1 December, 1926.)

1. Estates—Rule in Shelley's Case—Canons of Descent.

The rule in *Shelley's case* is a rule of property as well as a rule of law, and applies when there is an estate of freehold in the ancestor of the first taker who has acquired by, through or in consequence of the same assurance which created a limitation to his heirs, used in the conveyance in its technical sense as importing a class of persons to take indefinitely in succession from generation to generation according to the canons of descent, and who take an estate of the same character or quality as the first taker, either legal or equitable, the limitation over being of an inheritance in fee or in tail.

2. Same—Reason for the Rule.

The present existence of the rule in *Shelley's case* is for the purpose of preventing the tying up of the title to real property and to place it in channels of commerce, and the doctrine of *cessat ratione cessat lex ipsa* (the law ceasing with the reason therefor) does not apply.

3. Same.

Under the provisions of a devise of a life estate to the testatrix's stepdaughter after the life of her mother, then to her "lawful heirs if any and if not to the testatrix's own children or their heirs," a fee-simple title is conveyed to the stepdaughter under the rule in *Shelley's case*.

APPEAL by plaintiff from *Schenck, J.*, at May Term, 1926, of UNION.

Civil action to quiet title and to remove cloud therefrom, arising out of a claim made by the defendant that, under her father's will, she has a contingent interest in the *locus in quo*.

Upon the facts found, a jury trial being waived, judgment was entered for the defendant, from which the plaintiff appeals.

Vann & Milliken for plaintiff.
John C. Sikes for defendants.

STACY, C. J. On the hearing the question for decision was properly made to depend upon the construction of the following item in the will of James C. Hargett:

"Item 5th. I give and bequeath to my eldest stepdaughter, Sarah Myers (now Sarah V. Benton) a home and support with her mother during her single days, and fifty acres of land at her mother's death, of the tract I now live on, to include all the buildings, to have and to hold her lifetime, and then to her lawful heirs, if any, and if not, then it is to go to my own three children, or their heirs, together with all the personal estate I have given her."

The plaintiff is the eldest stepdaughter of the testator and holds possession of the land described in the complaint, under this item of the will. The defendant is one of the three children of the testator mentioned in the latter part of said clause and claims a contingent interest in the land described therein, which she says will vest in right upon the death of Sarah V. Benton without "lawful heirs," or lawful children, her surviving, or certainly without her ever having had a "lawful heir" or lawful child. The record shows that Sarah V. Benton is above 65 years of age; that she has given birth to but one child, which was illegitimate and is now dead.

It is the contention of the plaintiff that she holds a fee-simple title to the land devised in item five above; while the defendant contends that the plaintiff takes only a life estate, or at most a defeasible fee, in the property so devised.

It is conceded that the relative merits of the controversy depend upon whether the limitations in this clause are so framed as to attract the rule announced in the celebrated English case of *Wolfe v. Shelley*, 1 Coke, 93-b, commonly known as the rule in *Shelley's case*, which, with us, has become a rule of property as well as a rule of law, and is stated by *Lord Macnaghten* in *Van Grutten v. Foxwell*, Appeal Cases, Law Reports (1897), p. 658, as follows: "It is a rule in law when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, that always in such cases 'the heirs' are words of limitation of the estate and not words of purchase."

It is hardly necessary to observe that every part of this statement is deserving of attention, from the opening words, which declare it to be a "rule in law," to the last clause, which says that "the heirs" can never take by purchase when the rule applies.

The sources of the rule are apparently lost in the mystery that characterizes all origins. No one seems to know its author, or how it came to be laid down. Even its purpose, as well as the wisdom of its adoption, has been the subject of controversy. The better view seems to be that it sprang from the holding of lands by feudal tenure, and that its purpose originally was to prevent the lord from being defrauded of the chief fruits or seigniory, which he did not receive when an estate went by purchase. It was equally important to the tenant that the distinction between descent and purchase should be maintained. Speaking to the subject in *Williams v. Houston*, 57 N. C., 277, *Pearson, C. J.*, said: "'The rule' was adopted for the prevention of fraud, and the substance of it is, where an estate for life is given to one and by the same conveyance the property is given to his heirs in such a manner that the

same persons are to take the same estate as they would have taken by operation of the law had the whole estate been given to the tenant for life, he shall take the whole estate, and such persons shall take by operation of law, and not as purchasers, notwithstanding the express intention was that the one should take a life-estate only and the others should take as purchasers; the principle is the same as that by which, if one seized in fee in England devises to his eldest son in fee simple, the son shall take by descent and not under the devise; for, although the intention that he shall take by the devise is express, yet such intention being in manifest fraud of the rights of third persons shall not be carried into effect."

Today the rule serves quite a different, but no less valuable, purpose, in that it prevents the tying up of real estate during the life of the first taker, facilitates its alienation a generation earlier, and at the same time, subjects it to the payment of the debts of the ancestor. *Walker v. Butner,* 187 N. C., 535; *Crisp v. Biggs,* 176 N. C., 1; *Cohoon v. Upton,* 174 N. C., 90. "It is a rule or canon of property, which so far from being at war with the genius of our institutions, or with the liberal and commercial spirit of the age, which alike abhor the locking up and rendering inalienable real estate and other property, seems to be in perfect harmony with both. It is owing perhaps to this circumstance that the rule, a Gothic column found among the remains of feudality, has been preserved in all its strength to aid in sustaining the fabric of the modern social system." *Reese, J.,* in *Polk v. Faris,* 9 Yerg., 209, 30 Am. Dec., 400.

The learned writers on the subject also disagree as to the manner in which the rule operates. It is said by many, who constitute by far the larger number, that the limitation to the heirs unites and coalesces with the limitation of the freehold to the ancestor, and thus operates to vest in the first taker a fee simple or a fee tail, as the case may be, divided or split by intervening limitations, where there are any. (There were intermediate estates in *Shelley's case* itself.) By others it is said that there is no such union or coalescence, but that the limitation to the heirs is executed in the ancestor, to whom a gift is implied, so as to vest in him another and larger estate, which swallows up the particular estate of freehold when there are no intervening limitations. *Van Grutten v. Foxwell,* 77 L. T. N. S., 170.

But whatever may have been the origin of the rule, and regardless of the mode of its operation, it is firmly established, not only as a rule of law, but also as a rule of property, in this jurisdiction, and it is our duty to observe it wherever the limitations in any deed or will call for its application. *Hartman v. Flynn,* 189 N. C., 452; *Fillyaw v. Van Lear,*

188 N. C., 772; *Bank v. Dortch*, 186 N. C., 510; *Wallace v. Wallace*, 181 N. C., 158. It is one of the ancient landmarks which the fathers have set in the law, as it relates to the subject of real property, and we should be slow to remove it. Prov., 22:28.

A restatement of the essential facts, stripped of all irrelevant matter, appearing in the case from which the rule takes its name, may aid measurably in determining its application to other facts or other limitations.

Edward Shelley, being tenant in tail general, had two sons, Henry and Richard. Henry died in his father's lifetime, leaving a daughter and his wife *enciente* with a son. The premises being in lease for years, the father suffered a common recovery to the use of himself for life, and after his death to the use of certain persons for twenty-four years, remainder to the use of the heirs male of his body lawfully begotten and the heirs male of the body of such heirs male lawfully begotten, and died before Henry's widow was delivered. Richard, the younger son, being the only heir male of his father then *in esse*, entered, and made a lease to the plaintiff. Henry's son was afterwards born, who entered and ejected Richard's lessee. Now it was a rule of the common law that the title of one in possession acquired by *purchase* could not be divested by an after-born nearer heir, but that the estate of one who took by *descent* could. (The law in this respect was changed by statute in North Carolina in 1823, now C. S., 1654, Rule 7, but without affecting the rule in *Shelley's case*.) So the great question was, "whether Richard, under the uses of the recovery, took by purchase or by descent." It was held that Richard took *quasi* by descent till the birth of Henry's son, who then became entitled. Hence, the plaintiff lost in the case and was not allowed to recover.

There is very little difference, if any, among the writers as to the things which must concur in order to give rise to the application of the rule. It is generally held: (1) that there must be an estate of freehold in the ancestor or the first taker; (2) that the ancestor must acquire this prior estate by, through, or in consequence of the same assurance which contains the limitation to his heirs; (3) that the words "heirs" or "heirs of the body," or some equivalent expression, must be used in a technical sense as importing a class of persons to take indefinitely in succession, from generation to generation, in the course marked out by the canons of descent; (4) that the interest acquired by the ancestor and that limited to his heirs must be of the same character or quality, that is to say, both must be legal or both must be equitable, else the two would not coalesce, or merge, whichever be its mode of operation; and (5) that the limitation to the heirs must be of an inheritance in fee or in

tail, and after the similitude of a remainder. See note, 29 L. R. A. (N. S.), 963; 24 R. C. L., 887; *Hampton v. Griggs,* 184 N. C., 13.

Speaking of the rule in *Shelley's case* and answering the arguments leveled against it, *Dorsey, C. J.,* in *Horne v. Lyeth,* 4 Har. & J., 431, had the following to say: "That to disregard rules of interpretation sanctioned by a succession of ages, and by the discussions of the most enlightened judges, under pretense that the reason of the rule no longer exists, or that the rule itself is unreasonable, would not only prostrate the great landmarks of property, but would introduce a latitude of construction, boundless in its range and pernicious in its consequences."

The use of words is subject to such variety of combination that often the interpretation or construction of deeds, and especially of wills, is fraught with puzzling effect upon those who are required to determine their meaning. It is therefore necessary to establish rules, and important to uphold them, so that those who are called upon to advise may safely give opinions on titles to real property.

We had occasion in *Hampton v. Griggs,* 184 N. C., 13, to consider the differences appearing in a number of cases where the rule was held to be applicable as distinguished from those in which it was held to be inapplicable. Tested by what was said in that case, we think the limitations in the instant will call for the application of the rule, and vest in Sarah V. Benton a fee-simple estate to the lands described in the complaint. The devise in *Wool v. Fleetwood,* 136 N. C., 460, is strikingly similar to the one now presented for construction. What was said in that case would seem to be controlling here. It appears to be an authority for the plaintiff's position.

Reversed.

MRS. MARY G. WOODLIEF, MRS. ETTA RAY, W. F. PERRY AND MRS. IDA C. PERRY, HIS WIFE, J. E. BLACKLEY AND MRS. META BLACKLEY, HIS WIFE, *v.* A. H. WOODLIEF, E. S. WOODLIEF AND MRS. ANNIE WOODLIEF, HIS WIFE, WILLIAM H. WOODLIEF AND MRS. ETTA WOODLIEF, HIS WIFE, AND E. T. WOODLIEF AND MRS. META WOODLIEF, HIS WIFE.

(Filed 1 December, 1926.)

1. **Deeds and Conveyances—Probate—Justices of the Peace—Clerks of Court—Certificate for Registration—Statutes.**

Where a justice of the peace has properly and in due form taken the acknowledgment of the grantor and his wife to a deed to lands, and the clerk of the court has failed or omitted to sign his name to the certificate for registration, the registration of the instrument is no evidence

that the clerk or his deputy has complied with the provisions of 3 C. S., 3305, requiring the clerk, etc., to adjudicate the sufficiency of the certificate of the justice of the peace, or permit a copy of such deed to be used in evidence under the provisions of C. S., 1763. The curative statutes, 3331; 3 C. S., 3366 (a), (b), (c), (d), have no application.

2. Statutes—Interpretation—Clerks of Court—Certificates—Deeds and Conveyances.

The requirements of 3 C. S., 3305, that the clerk of the court shall pass upon the sufficiency of the probate of a deed, is mandatory and not directory.

APPEAL by plaintiffs from *Devin, J.*, and a jury, at April Term, 1926, of GRANVILLE. New trial.

Royster & Royster and Brummitt & Taylor for plaintiffs.
A. W. Graham & Son for defendants.

CLARKSON, J. (1) John G. Jones, on 14 September, 1875, conveyed to William B. Woodlief 116 acres of land. (2) William and Frances Harp conveyed to said Woodlief 65 acres of land and also 10 acres of land, under separate deeds. All the deeds were duly recorded in Granville County where the land was situate. Only the *116 acres of land* is involved in the controversy.

It was shown in evidence by plaintiffs that Mary G. Woodlief, wife of William B. Woodlief, was dead and their children, the only heirs at law of William B. Woodlief, were plaintiffs and defendants (husbands and wives made parties). (1) A. H. Woodlief, (2) W. H. Woodlief, (3) E. T. Woodlief, (4) E. S. Woodlief, (5) Etta Ray (her husband is dead), (6) Ida C. Perry, (7) Meta Blackley. The deed from John G. Jones to William B. Woodlief for the 116 acres of land was introduced in evidence and testimony as to who were the heirs of said Woodlief without objection. The plaintiffs rested.

The defendant then introduced a deed dated 25 August, 1913, from William B. Woodlief and wife M. G. Woodlief, to Bill Woodlief (W. H.) and Elijah Woodlief (E. S.) for the 116 acres of land. The plaintiffs objected, the objection was overruled and this is practically the only assignment of error on appeal here.

The court below charged the jury in accordance with his ruling that the deed was properly recorded. It appears that the deed was in all respects sufficient in form and substance to pass the title in fee simple and signed by W. B. Woodlief and wife, M. G. Woodlief. It was duly acknowledged before a justice of the peace with the wife's privy examination.

The following appears on the deed:

"North Carolina—Granville County.

"The foregoing certificate of J. W. Whitfield, a J. P., of Granville County, is adjudged to be correct and sufficient. Let the instrument, with the certificates, be registered.

"Witness my hand and official seal, this ..... day of ....., 19.....

"Clerk Superior Court.

Filed for registration at 2:25 o'clock p.m., 15 November, 1913, and duly registered.

"J. B. POWELL, Register of Deeds."

3 C. S., 3305, is as follows: "When the proof or acknowledgment of the execution of any instrument, required or permitted by law to be registered, is had before any other official than the clerk or deputy clerk of the Superior Court of the county in which such instrument is offered for registration, the clerk or deputy clerk of the Superior Court of the county in which the instrument is offered for registration shall, before the same is registered, examine the certificate or certificates of proof or acknowledgment appearing upon the instrument, and if it appears that the instrument has been duly proved or acknowledged and the certificate or certificates to that effect are in due form, he shall so adjudge, and shall order the instrument to be registered, together with the certificates. If the clerk of the Superior Court is a party to or interested in such instrument such adjudication and order of registration shall be made by his deputy or by the clerk of the Superior Court of some other county of this State or by some justice of the Supreme Court of this State or some judge of the Superior Court of this State. The acknowledgment of such instruments may also be made before a justice of the peace of said county, and the adjudication of the sufficiency of the certificate of said justice may be made by said clerk or his deputy: *Provided,* that nothing contained herein shall prevent the clerk of the Superior Court, who is a stockholder or officer of any bank or other corporation, from adjudicating and ordering such instruments for registration, as have been acknowledged or proven before some justice of the peace or notary public. All probates made prior to 8 March, 1921, by any such clerk of conveyances or other papers by any corporation in which such clerk was an officer or stockholder are hereby validated and declared sufficient for all such purposes."

The only questions involved (1) Is the failure of the clerk to sign his name fatal and makes the registration a nullity? (2) Has this been cured by statute? *Heath v. Lane,* 176 N. C., 119, is not applicable.

It will be noted that the acknowledgment was taken by a justice of the peace in Granville County, where the land was situate. C. S., 3293 mentions the officials of the State who may take proof or acknowledgment of the execution of deeds, etc., "and the several justices of the peace." C. S., 3296—By justice of peace of other than registering county: "The certificate of proof or acknowledgment made by such justices of the peace shall be accompanied by the certificate of the clerk of the Superior Court of the county in which said justice of the peace resides, that such justice of the peace was at the time his certificate bears date an acting justice of the peace of such county, and that such justice's genuine signature is set to his certificate. The certificate of the clerk of the Superior Court herein provided for shall be under his hand and official seal."

3 C. S., 3305, *supra,* speaking in reference to the county in which the land is situate: "The acknowledgment of such instruments may also be made before a justice of the peace of said county, and the adjudication of the sufficiency of the certificate of said justice may be made by said clerk or his deputy." This is read in connection with what is prior said in 3305, *supra:* "shall, before the same is registered examine the certificate or certificates of proof or acknowledgment appearing upon the instrument, and if it appears that the instrument has been duly proved or acknowledged and the certificate or certificates to that effect are in due form, he shall so adjudge, and shall order the instrument to be registered, together with the certificates."

The clerk or his deputy *shall, before the same is registered examine the certificate,* etc., *shall so adjudge, and shall order the instrument to be registered,* but this was not done by the clerk. By frequent use of "shall" we think this mandatory and the registration a nullity, but the deed although unregistered on account of the defect, if actually executed without fraud or mistake, is valid between the parties and as to all others except purchasers for value and creditors. *King v. McRacken,* 168 N. C., 621. The language is imperative and not merely directory—otherwise an acknowledgment before a justice of the peace under the facts here can be recorded by the register of deeds, and this we think would nullify the plain provisions of the statute.

C. S., 1763, provides that certified copies of registered instruments, such as deeds, etc., in certain cases are evidence. In *Ratcliff v. Ratcliff,* 131 N. C., p. 425, it is held the record of a registered deed competent evidence without producing original, where no rule of court for production of original issued. It is at least prima facie evidence. If the instrument is not properly admitted to probate and registration, a copy of the record is not sufficient evidence. *Buchanan v. Hedden,* 169 N. C., 222. In that case it is further held: "The deed from E. C.

Hedden was not properly executed by him as attorney, and, besides, was never probated, so as to authorize its registration and introduction as evidence. Proof before a justice of the peace was not sufficient for this purpose, as it is required by statute that the clerk of the Superior Court shall pass upon his certificate and order the deed to registration. Nothing of this kind was done. The law requires that the deed or other instrument, shall be properly probated 'before the same shall be registered.' Revisal, sec. 999." (C. S., 3305, *supra.*) The deed as recorded, or copy of the deed from the registration book, on account of the defective probate and registration, was not evidence, and the court below was in error in admitting it.

Has this been cured by statute? We think not.

We have carefully examined C. S., 3331. Also 3 C. S., 3366(a), taken from Public Laws 1921, ch. 15, sec. 1. Also 3 C. S., 3366(b), (c), (d), taken from Public Laws 1921, ch. 19, secs. 1, 2, 3 and 4. We have compared 3 C. S., 3366(b), (c) and (d) with Public Laws 1921, ch. 19, secs. 1, 2, 3 and 4. We do not think that the requirements of C. S., 3305 have been cured and the above curative statutes have no application to the facts in the present action.

Chapter 86, Public Laws 1923, or chapter 99, Public Laws 1925, do not affect the position here taken.

In *Rogers v. Bell,* 156 N. C., at p. 386, this Court, speaking to the question involved, says: "It is also held that where laws have been codified, and in case of ambiguity or doubt, permitting construction, it is allowed that the court may examine the original legislation, as an aid to a correct interpretation. Lewis' Sutherland, sec. 450."

For the reasons given, there must be a

New trial.

MARTHA DULIN, BY HER NEXT FRIEND, R. W. DULIN, v. HENDERSON-GILMER COMPANY.

(Filed 1 December, 1926.)

1. Negligence—Damages—Evidence—Expert Opinions—Instructions.

In an action to recover damages for injury to plaintiff's teeth, alleged to have been caused by the negligence of the defendant, it is competent for a dentist who had personally examined her after the injury complained of, and who was attending her in his professional capacity, and who had qualified as an expert witness in such matters, to testify as to the present and future effect the injury would have upon the plaintiff at her age, the change in her facial expression made thereby, etc., such falling within the experience of his profession, the damages recoverable being prospective as well as present.

2. **Negligence—Instructions — Rule of the Prudent Man — Appeal and Error.**

Where the rule of the prudent man is applicable under the allegations and evidence in a personal injury case, the failure to fully charge upon this phase of the controversy is not reversible error when the judge has generally charged it elsewhere in his instructions, and when thus considered, the jury could not have been misled.

3. **Instructions—Interpretation — Instructions Construed as a Whole—Appeal and Error.**

Where the trial judge illustrates his meaning in an instruction to the jury with a hypothetical state of facts, it will not be held for error if he so informs the jury at the time, and tells them there was no evidence thereof, and men of intelligence would not have been misled thereby.

4. **Instructions—Requests for Instructions—Damages—Appeal and Error.**

An instruction of the court upon the measure of damages, received from a personal injury, will not be held for error when it is correct upon the general principles applicable in the absence of a request for special instructions, making them more specific.

APPEAL by defendant from *Harding, J.*, at February Term, 1926, of MECKLENBURG. No error.

Whitlock, Dockery & Shaw for plaintiff.
John M. Robinson for defendant.

ADAMS, J. This is an action to recover damages for personal injury alleged to have been caused by the negligence of the defendant's employee in the operation of a motor truck. The plaintiff was in an Essex coach owned by J. L. Delaney and driven by his daughter Martha. On the morning of 26 November, 1924, between 8 and 9 o'clock the two girls, each about fourteen years of age, were on their way to school. The plaintiff was on the front seat with Martha Delaney, but did not control or direct the driving. They were going south on the right side of Cecil Street. As they approached the point of its intersection with Fifth Street, they did not see the defendant's truck; but a moment later the truck came out of Fifth Street into Cecil Street and turned to the south. The truck and the car were then going in the same direction. The alleged collision was described by the driver of the car: "I put on brakes at first, and I saw that the car (truck) was going to hit me, and I started to speed up a little. I do not know exactly what speed the truck was going. It was going faster than I was. I pulled over to the right in order to keep him from hitting me. I was on the right as it was, and after I moved over I struck the curbing, and just as I hit the curbing he hit me. He was on the right-hand side. . . . The

truck struck the front left fender of my car. My car hit the curbing after it was struck, and then hit a telephone pole and turned over." There was evidence that the car approached the intersection of the street at eight miles an hour and that proper signals were given; also that the driver of the truck could have seen the car, and that he gave no signal of his approach.

The plaintiff testified as to the nature and extent of her injuries: she was thrown against the windshield; three of her teeth were knocked into the roof of her mouth; her lip was cut through; her head, her ankle, and her knee were injured; and her arm was cut with glass. Other evidence was introduced by the plaintiff; the defendant offered none. The issues as to negligence and damages were answered in favor of the plaintiff, and from the judgment rendered the defendant appealed, assigning error in the conduct of the trial.

Dr. Hull, an expert in dentistry, was called to see the plaintiff on the day she was injured. In his testimony he described the condition of the plaintiff's mouth and teeth and the method of his treatment. He said that perhaps six weeks afterwards, by means of gold crowns, he put in her mouth a temporary bridge which was likely to break almost any time, and that permanent work could not be done until her teeth had fully developed. He was then permitted to testify that gold crowns usually produce pyorrhœa, that the loss of her teeth had already affected and would continue to affect her facial expression, and that treatment of her teeth after she shall have reached maturity will be necessary. The defendant excepted. The evidence, we think, was not incompetent, as the defendant contends, for the reason that it was aesthetic or problematical. The witness testified as an expert, giving his opinion as to the usual and ultimate effect or consequence of such injuries as the plaintiff received. *Alley v. Pipe Co.*, 159 N. C., 327. His opinion was formed after he had made an examination of the plaintiff's teeth, and it was not necessary that all his answers should be based upon a hypothetical statement of facts. *In re Peterson*, 136 N. C., 13. That the plaintiff was entitled to damages for prospective as well as for past and present injuries is not denied.

Upon the first issue the jurors were instructed that the burden was on the plaintiff to satisfy them by the greater weight of the evidence that the defendant was negligent, that is, that the defendant did something it ought not to have done or left undone something it should have done, which doing or leaving undone brought about the plaintiff's injury. The defendant's criticism of this instruction is the omission of any reference to the rule of the prudent man. There are many decisions to the effect that the substance of the rule should be embodied in an

instruction dealing with the question of negligence. If it be granted that the instruction complained of is not as explicit as it should have been, the omission is supplied in a subsequent part of the charge, in which the jury was told that the law required the defendant to exercise due care in the operation of the truck, due care meaning "that care which an ordinarily prudent person surrounded and situated as he was there at that time would have exercised." It is now regarded as elementary that the judge's instructions to the jury must be considered as a whole. *Harris v. Harris,* 178 N. C., 7; *Bradley v. Mfg. Co.,* 177 N. C., 153.

In stating the principle that the negligence of the driver of the car would not be imputed to the plaintiff, who was a guest, his Honor remarked that the operation of a car by a person under the age of sixteen years is prohibited, and that the defendant's driver committed a breach of the statute if he ran the truck into the intersecting streets at a speed in excess of fifteen miles an hour. The defendant excepted to the latter part of the instruction on the ground that there was no evidence to support it, and it relies upon a number of cases to sustain its position. This remark was made by the judge in his explanation of the terms of the statutes regulating the use of motor vehicles. We do not see how the jurors could have been misled, for they were immediately told that there was no evidence that the defendant's driver had exceeded the speed limit. We must assume, as said in *Harris v. Harris, supra,* that the jury was composed of men of understanding and intelligence, and that they comprehended the instruction given.

Exception was noted to the instruction given for estimating damages. It is said that the law was not sufficiently explained; and while the statement of the rule was not as full as it might have been, the general principle was given: on the basis of a cash settlement the jury was to award a reasonable compensation for the injuries inflicted. The extent of the injuries, it is true, was stated only as contentions, but the finding of the facts was left to the jury; and in the absence of a prayer for more definite instructions as a guide for the jury, the general rule having been given, the exception in our opinion is not sufficient for awarding a new trial. *Murphy v. Lumber Co.,* 186 N. C., 746; *Ledford v. Lumber Co.,* 183 N. C., 614; *Hill v. R. R.,* 180 N. C., 490, and cases cited. The remaining exceptions also are untenable. We find

No error.

KELLY SPRINGFIELD TIRE COMPANY ET AL. v. W. P. LESTER AND FLORENCE LESTER, HIS WIFE.

(Filed 8 December, 1926.)

1. **Trusts—Deeds and Conveyances — Resulting Trusts — Husband and Wife—Statutes.**

When a deed from a husband to his wife is sought to be set aside by his creditors for fraud, C. S., 1005, 1007, evidence tending to show that she had a resulting trust by reason of her having conveyed the same land to her husband without consideration moving to her, is inadmissible under the principle that a grantor in a deed to lands may not engraft a resulting trust upon his conveyance of the fee-simple title with full covenants and warranty of title.

2. **Same—Evidence—Burden of Proof.**

It is upon the one seeking to engraft a parol trust in his own favor upon a conveyance of the fee-simple title when permissible to establish his right by clear, strong and convincing proof.

3. **Conflict of Laws—Lex Loci Forum—Evidence—Burden of Proof—Statutes.**

Where a party to an action contends that the law of the forum in another state controls the disposition of the issues involved, he is required to show statute or written law or controlling decisions thereon, or such facts as would make the laws of that state applicable. C. S., 1749.

APPEAL by plaintiffs from *Daniels, J.*, at April Term, 1926, of HOKE. Former appeal reported in 190 N. C., 44. New trial.

Action in the nature of a creditors' bill to set aside a deed executed by the defendant, W. P. Lester, to his wife.

The verdict was as follows:

1. Was the deed from W. P. Lester to his wife, Florence Lester, made in consideration of a preëxisting debt?

Answer: No.

2. Is there a resulting trust in the said land in favor of the defendant, Florence Lester, as alleged in the answer?

Answer: Yes.

3. If so, in what interest in the said land?

Answer: One-half undivided interest in McNair land.

Judgment for the defendants. Exceptions and appeal by the plaintiffs.

H. W. B. Whitley and J. W. Currie for plaintiffs.
G. B. Rowland and Smith & McQueen for defendants.

ADAMS, J. The object of the action is to set aside a deed executed by the defendant, W. P. Lester, to his wife, codefendant, on 18 March,

1922, purporting to convey a tract of land situated in Hoke County. The plaintiffs are creditors of W. P. Lester. They allege that he is indebted to the Tire Company in the sum of $579.19 for goods sold and delivered and to Frank E. Walker on promissory notes aggregating more than $6,000; that he conveyed land to his wife with intent to hinder, delay and defraud his creditors; that he is insolvent and at the time of the conveyance did not retain property sufficient and available for the satisfaction of his creditors. C. S., 1005, 1007. The principal defense is that the deed was executed for the purpose of conveying to Mrs. Lester her interest in land which McNair had conveyed to W. P. Lester for her benefit.

The testimony of the defendants is neither clear nor satisfactory. Its tenor is this: W. P. Lester acquired certain interests in his father's estate and thereby became the owner of 170 acres of land in Marlboro County, South Carolina. On 15 January, 1889, he conveyed this land to L. P. McLaurin for the recited consideration of $3,288.82; McLaurin forthwith conveyed it to Mrs. Lester, reciting the same consideration; and as a part of the transaction Mrs. Lester immediately executed and delivered to McLaurin a mortgage on the land to secure an indebtedness of $2,525. On 20 December, 1898, she executed another mortgage on the land to secure an indebtedness of $1,618.91 for money lent her by Asenath Ellen and Ann Eliza Lester, sisters of the male defendant; and on 11 November, 1910, she conveyed to her husband with full covenants of warranty the 170-acre tract in Marlboro in consideration of "one dollar and affection." The defendants jointly conveyed this land to James A. Stanton on 1 January, 1918, for $34,000, and in November, 1917, W. P. Lester purchased the land in controversy, 190 acres in Hoke County, from J. M. McNair at the price of $19,000. On 18 March, 1922, W. P. Lester conveyed the McNair land to his wife, who at that time paid neither money nor any other consideration.

There is evidence tending to show that W. P. Lester borrowed money with which to pay for the interests he bought in his father's land; that McLaurin furnished this money through E. D. McCall, and that the deed from Lester to McLaurin, the deed from McLaurin to Mrs. Lester, and her mortgage to McLaurin were executed for the purpose of obtaining and securing this loan. It is also in evidence that the remainder due on the McLaurin mortgage was paid by Mrs. Lester with money lent her by her husband's sisters and secured by her mortgage to them dated 20 December, 1898. W. P. Lester testified that in payment of the mortgage held by his sisters he applied $1,180 which his wife had let him have out of her separate estate in addition to other sums she had turned over to him from time to time; and Mrs. Lester said that

she let her husband have the money in 1909 "to help pay off the mortgage against the 170-acre tract, and that is what I meant when I said I put it in the land." This money, then, was received and applied by W. P. Lester before he left South Carolina and before he bought the McNair land; consequently a material question is whether any part of Mrs. Lester's separate estate was used in the purchase of the land conveyed by McNair to Lester in November, 1917.

It is important to remember that her deed to her husband bears date 11 November, 1910. There was testimony that at this time the mortgages had been paid and that she owned the Marlboro land in fee. Evidence was admitted subject to the plaintiff's exception that the purpose of this deed was to enable W. P. Lester "to manage as he saw fit." "We were speaking," said Mrs. Lester, "of selling and I thought any time it come up he would know just what to do, you know, and that it would be better to do it then"; subject to exception evidence also was admitted that the deed was executed "so that he could sell."

No question is made as to the validity of the deed from Mrs. Lester to her husband or that it conveyed the fee. The plaintiff excepts to the evidence for the reason that the only object, and certainly the effect, is to engraft upon the deed a parol trust in favor of the grantor. The implication is that W. P. Lester was "to manage" or "to sell" the land for the benefit of Mrs. Lester. This is indicated not only by the evidence but by the instructions given the jury. After charging that the jury should determine whether a resulting trust attached to the conveyance made by McNair to Lester, his Honor used this language: "Now, the question you are to consider is this, did Mr. and Mrs. Lester agree at the time the deed of November, 1910, was made by Mrs. Lester to Mr. Lester that he should sell the property for her benefit? If you are satisfied, gentlemen of the jury, by evidence strong, clear, cogent and convincing, that they did so agree, then the proceeds of the sale of the South Carolina land would be the money or property of Mrs. Lester, and if it was invested as it is admitted, I believe, on all sides, if it was paid as the purchase price of the McNair land, and the land was conveyed to Mr. Lester, then there would be a resulting trust in favor, a resulting trust in the land, in favor of Mrs. Lester, and there would be a resulting trust as to the whole interest in the land except for the fact that she claims only a resulting trust in a half interest in it. If you are not satisfied by the degree of proof that I have mentioned to you of the truth of Mrs. Lester's contention, you will answer this second issue No, but if you are satisfied of the truth of her contention by strong, cogent and convincing evidence, then you will answer it Yes." By these instructions the resulting trust alleged to have been engrafted on the McNair conveyance is made to depend on the ante-

cedent question whether a trust resulted to Mrs. Lester on 11 November, 1910, upon the execution of her deed to her husband. If W. P. Lester did not hold the land in trust for his wife under her deed to him, it follows under the instructions given that he did not hold it in trust for his wife under the deed executed to him by McNair, the contention being that her money went into the purchase of the McNair property. It is evident, we think, that the circumstances attending the execution of the McNair deed are not, if considered without reference to Mrs. Lester's deed, sufficient of themselves to create a trust. The vital question, then, is this: Should the judge have excluded the evidence offered by the defendants to establish a resulting trust in favor of Mrs. Lester, the grantor, at the time she conveyed the Marlboro land to her husband?

The purpose of the statute of uses (27 Henry VIII) was to transfer the use of the land into possession, but in construing the statute the courts held that there were certain nonexecuted uses which could not be enforced at law. For the purpose of compelling performance the courts of chancery took jurisdiction of uses not executed by the statute and in this way worked out the equitable doctrine of trusts, among them those which arise by operation of law, consisting of constructive trusts and resulting trusts. *Tyndall v. Tyndall,* 186 N. C., 272. *Lord Chancellor Hardwicke,* in his classification of resulting trusts includes voluntary conveyances or conveyances made without consideration. With respect to such conveyances it was formerly held that a trust resulted to the grantor for the reason that the law would not presume a voluntary disposition of property. This was in analogy to the common law; but the rule that a trust resulted to the owner who voluntarily conveyed his land was confined to common law conveyances or assurances such as feoffments, grants, fines, recoveries, and releases which operated without consideration and vested the estate by the act itself, as by livery of seizin. By a feoffment the legal title passed to the feoffee and a use resulted to the feoffor. Lord Coke and Sir Francis Bacon said that when feoffments were made it became doubtful whether estates were in use or in purchase, and as purchases were things notorious and uses were things secret the courts of chancery thought it more convenient to require the purchaser to prove his consideration than the feoffor to prove his trust. 1 Perry on Trusts (6 ed.), secs. 124, 125, 161, 162.

But the deed from Mrs. Lester to her husband was not a feoffment. Almost all conveyances now in use are in form deeds of bargain and sale and operate to pass the legal title by virtue of the statute of uses. In conveyances of this character parol evidence is not admissible to establish a resulting trust in favor of the grantor. The principle is stated by Pomeroy: "In all the instances belonging to this first form of resulting trusts, the intention that the donee is not to enjoy the

beneficial interest, but that a trust is to result, or the contrary intention, must appear expressly or by implication from the terms of the instrument itself by which the property is conveyed. If the instrument is a will, then no extrinsic evidence is ever admissible to show the testator's meaning, nor even to show a mistake. If the instrument is a deed, no intrinsic evidence of the donor's intention is admissible, unless fraud or mistake is alleged and shown. If, therefore, there is in fact no consideration, but the deed recites a pecuniary consideration, even merely nominal, as paid by the grantee, this statement raises a conclusive presumption of an intention that the grantee is to take the beneficial estate, and destroys the possibility of a trust resulting to the grantor, and no extrinsic evidence would be admitted to contradict the recital, and to show that there is in fact no consideration, except in a case of fraud or mistake." 3 Pomeroy's Equity Jurisprudence (4 ed.), sec. 1036.

Our own decisions accord with the doctrine, which in *Gaylord v. Gaylord*, 150 N. C., 222, is discussed by *Hoke, J.*, with full citation of the authorities. There, it is said, that in a deed giving on the face clear indication that an absolute estate was intended to pass, either by recital of a valuable consideration or by an express covenant to warrant and defend the title, no trust would result in favor of the grantor by reason of the circumstance that no consideration was in fact paid, and that the main current of decision is in the direction of establishing the principle that as between the parties a trust cannot be fastened on an absolute deed by evidence that the grantee paid no consideration or that he agreed to hold the premises for the grantor. As to the latter proposition it is said: "Nor do we think it permissible upon the evidence that the plaintiffs should engraft a parol trust on a deed of the kind presented here by express declaration or agreement. The seventh section of the English Statute of Frauds, forbidding "the creation of parol trusts or confidences of lands, tenements or hereditaments, unless manifested and proved by some writing," not being in force with us, and no statute of equivalent import having been enacted, these parol trusts have a recognized place in our jurisprudence and have been sanctioned and upheld in numerous and well-considered decisions. *Avery v. Stewart*, 136 N. C., 436; *Sykes v. Boone*, 132 N. C., 199; *Shelton v. Shelton*, 58 N. C., 292; *Strong v. Glasgow*, 6 N. C., 289. Upon the creation of these estates, however, our authorities seem to have declared or established the limitation that except in cases of fraud, mistake or undue influence, a parol trust, to arise by reason of the contract or agreement of the parties thereto, will not be set up or engrafted in favor of the grantor upon a written deed conveying to the grantee the absolute title, and giving clear indication on the face of

the instrument that such a title was intended to pass. *Dickenson v. Dickenson, supra; Bonham v. Craig,* 80 N. C., 224; *Jackson v. Cleveland, supra,* reported also in 90 Amer. Dec., 226, with a full and learned note on this phase of the doctrine; *Dean v. Dean,* 6 Conn., 285; *Cain v. Cox,* 23 West Va., 594, 605; *Dyer v. Dyer,* White and Tudor Leading Cases in Equity (part 1), pp. 314, 344, 354, 355, 356, etc."

On this point the following additional authorities may be consulted: *Jones v. Jones,* 164 N. C., 320; *Campbell v. Sigmon,* 170 N. C., 348; *Walters v. Walters,* 172 N. C., 328; *Chilton v. Smith,* 180 N. C., 472; *Swain v. Goodman,* 183 N. C., 531; *Blue v. Wilmington,* 186 N. C., 321.

What we have said is not inconsistent with the decision in the former appeal. In granting a new trial for error in a directed verdict, *Varser, J.,* stated that the record disclosed some evidence of a resulting trust, but the competency of evidence—certainly of the evidence in the present record—was not passed upon or discussed.

The appellees suggest that whether a resulting trust grew out of Mrs. Lester's conveyance of the Marlboro land to her husband is to be determined by the laws of South Carolina; but they produced no statute, no written law, no book of reported cases, no oral evidence in support of their position. C. S., 1749. It is the deed from McNair to Lester upon which it is now sought to engraft the trust. The asserted trust in the execution of the deed from Mrs. Lester to her husband was evidentiary—one link in the chain of evidence, presenting the question whether the admissibility of the evidence excepted to is not to be determined by the law of the forum. The land described in her deed has long since been disposed of and is not the subject of this controversy. 12 C. J., 447, sec. 27; *ibid.,* 485. On the point made by the appellees reference may be made to the following cases: *Mowry v. Stogner,* 3 S. C., 251; *Winsmith v. Winsmith,* 15 S. C., 611; *Boozer v. Teague,* 27 S. C., 348; *Kinsey v. Bennett,* 37 S. C., 319.

For error in the admission of evidence a new trial is awarded.

New trial.

J. L. DeLANEY v. HENDERSON-GILMER CO.

(Filed 8 December, 1926.)

1. Negligence—Automobiles—Evidence—Impeachment—Contradiction — Substantive Evidence.

Where the plaintiff in his action to recover damages against the defendant for negligently causing a collision between its car and that of the plaintiff, on cross-examination has admitted that his car at the time was being driven by his daughter, under sixteen years of age, knowingly

in violation of the traffic law, testimony in answer to this evidence, that the daughter was an expert and careful driver is competent, though not to be considered as substantive evidence.

2. Appeal and Error—Objections and Exceptions.

Exception to the admissibility of evidence must be taken at the time of its admission by the complaining party, for the exception to be considered by the Supreme Court on appeal.

3. Instructions—Negligence—Automobiles—Appeal and Error—Rule of Prudent Man.

In an action against the defendant for damages caused to plaintiff for the latter's negligently causing a collision between the defendant's auto-truck and the plaintiff's automobile, an exception to the failure of the court to charge upon the rule of the prudent man will not be sustained, when construing the charge as a whole, this instruction was substantially and clearly given.

4. Negligence—Rule of Prudent Man—Proximate Cause.

It is not required under the rule of the prudent man that the defendant should have foreseen that a particular character of injury would result from his failure to observe the rule, and it is sufficient to sustain the action if an injury would likely result to some one from his failure to observe the rule, and that from his negligence the injury in suit was proximately caused to the plaintiff.

5. Same — Contributory Negligence — Traffic Laws — Statutes — Prima Facie Case—Proximate Cause—Evidence—Questions for Jury.

Where there is evidence that plaintiff's damages were caused by the defendant's negligence in a collision of the latter's auto-truck with the former's automobile, the fact that the plaintiff's car was being driven at the time by his daughter, under sixteen years of age, knowingly in violation of the traffic law, raises only a prima facie case of contributory negligence, and will bar his right of recovery only if it is the proximate cause of the injury in suit.

6. Damages—Negligence—Automobiles.

The measure of damages to the plaintiff's automobile proximately caused by the defendant's negligence in an automobile collision, is the difference in the market value of the car at the time, and what it would have brought after the collision, and evidence thereof is competent both immediately before and after the accident.

Appeal by defendant from *Harding, J.*, and a jury, at March Term, 1926, of Mecklenburg. No error.

The necessary facts will appear in the opinion.

James A. Lockhart for plaintiff.
John M. Robinson for defendant.

Clarkson, J. This is a civil action for actionable negligence brought by plaintiff against the defendant.

Martha DeLaney, a school girl in the 10th grade, about 14 years of age, on the morning of 26 November, 1924, about 9 o'clock, with the permission of her father, J. L. DeLaney, was driving to school in his Essex car with a companion, Martha Dulin. She had no city license; she had been driving a car about one year to a year and a half, with her father's permission, around the city. She was coming south down Cecil Street, between 7th and Elizabeth Avenue. Her description of the occurrence is as follows: "When I came to Fifth Street I was traveling between 8 and 10 miles an hour. I was watching the road. I did not see the defendant's truck until I had gotten almost in the mouth of Fifth Street; it was coming down Fifth Street, going west. Fifth Street runs down grade a good deal after it enters Cecil. I would say the truck was running between 15 and 20 miles an hour. I was on the right side of the street about four feet from the curb. Before I got to the corner I blew the horn four times and when I got there the truck was coming down. It did not stop, but kept on coming and I saw if I stopped he would hit me on the side and knock me down an embankment at the back of the school, so I speeded up to get past the car on the right before it struck me, but it struck me anyway. I was curving to the right. The car swerved to the right on my side and I tried to make the curve with the truck. Fifth Street stops at Cecil. There was a high embankment on the east side of Cecil Street, and you can't see a car coming down Fifth Street for that embankment. On the far side of Cecil there is a bank dropping about 10 feet from the street. The truck struck me on the front fender and knocked me up on the curbing and I hit the telephone post. It tore up the car in which I was riding, turned it over on the side after it struck the post. The truck struck the left front fender of my car on the side near the front. The car was taken to the motor company. I went to the hospital. His car was coming down Fifth Street and I turned to the left at the intersection." This testimony was corroborated by Martha Dulin, who was riding in the car with her.

The defendant, in its answer, denied negligence and set up the plea of contributory negligence.

The defendant introduced no evidence. The issues submitted to the jury were the usual ones in such cases—negligence, contributory negligence and damages. The jury found the defendant negligent, the plaintiff not guilty of contributory negligence, and assessed damages.

The first material assignment of error by defendant is to the following: "Q. Do you know whether she (plaintiff's daughter) is a careful or careless driver?" This assignment of error must be considered in the light of what had occurred before in the trial on cross-examination of J. L. DeLaney by the defendant to impeach and discredit his testimony and lessen its value before the jury. He was asked certain questions

and his answers were: "I knew that was a violation of the law. I am an attorney. I have been to the Legislature, a State Senator. I have also been recorder pro tem. I have tried people down there for violating traffic ordinances, as judge, and I have punished them, and I knew that this was a violation of the law to let my daughter drive alone on the streets when she was not but 14 years old."

On redirect-examination, the testimony complained of was brought out. This testimony was not offered as substantive, but it was in answer to the impeachment of the witness, DeLaney, for allowing his daughter under 16 years of age to operate a motor vehicle, with his knowledge and consent, contrary to the traffic law. No request by defendant was prayed to limit its scope. It was collateral to the main issue. In fact, the evidence of the two witnesses as to how the collision occurred was not contradicted by defendant.

The decisions cited by defendant are not applicable here, conceding, but not deciding, we do not think it reversible or prejudicial error.

Complaint is also made by defendant that the court in setting forth the contentions of plaintiff gave point to the error and this testimony was referred to: "She was young in years, under the age limit required by law, yet she knew how to drive and was an experienced and careful driver." It does not appear that exception was made at the time. It is well established by the decisions of this Court that if no objection is made at the time it is waived. *S. v. Sinodis,* 189 N. C., p. 565.

It is further contended that the court below in the charge upon negligence violated the prudent man rule and cites this excerpt from the charge: "There are a number of definitions as to negligence. Probably as easy and simple a definition as any I can think of at the moment is that where a man does a thing he ought not to do or leaves undone a thing he ought to do, which doing or leaving undone brings about injury to another. That is one definition and as far as I know about as simple to apply to this case as any I can think of."

In *Lea v. Utilities Co.,* 175 N. C., at p. 463, the Court said: "In order to establish actionable negligence, the plaintiff is required to show by the greater weight of the testimony, first, that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed the plaintiff under the circumstances in which they were placed, proper care being that degree of care which a prudent man should use under like circumstances and charged with a like duty; and second, that such negligent breach of duty was the proximate cause of the injury, a cause that produced the result in continuous sequence and without which it could not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under the facts as they existed. *Ramsbottom v. R. R.,* 138 N. C., 41."

In *Hudson v. R. R.*, 176 N. C., p. 492, *Allen, J.*, confirming the above rule, says: "To which we adhere, with the modification contained in *Drum v. Miller*, 135 N. C., 204, and many other cases, that it is not required that the particular injury should be foreseen, and is sufficient if it could be reasonably anticipated that injury or harm might follow the wrongful act." *Hall v. Rinehart & Dennis Co., post*, 706; *Boswell v. Hosiery Mills*, 191 N. C., at p. 558; *Moore v. Iron Works*, 183 N. C., 438.

The extract from the charge, standing alone, might be subject to some criticism, but the court below, in continuity, stating other aspects of the law of the case, charged: "The law does not require a man to become an insurer or guarantor; what the law requires him to do is to exercise reasonable care in the operation of his automobile and due care is the better word, and due care means that care which an ordinary prudent person, surrounded and situated as the driver was there on that occasion would have exercised. . . . And if defendant's driver in the operation of his truck exercised that care which an ordinary prudent person surrounded and situated as he was at the time would have exercised, then he would not be guilty of any negligence. But if he failed to exercise such care, then you find that failure was the proximate cause of the injury to the plaintiff's car, then it would be your duty to answer the first issue 'Yes.'"

We think these instructions as a whole substantially follow the law as laid down by this Court. The charge must be taken as a whole and not disconnectedly. *Hanes v. Utilities Co.*, 191 N. C., at p. 20; *Dulin v. Henderson-Gilmer Co., ante*, 638.

On the question of contributory negligence: In regard to Martha DeLaney driving the car under 16 years of age, contrary to the law, the court charged: "As I said before, violation of the law is itself prima facie negligence, *per se* negligence, but it is not that negligence which constitutes liability unless it becomes a proximate cause of the injury. So, in this case, the court charges you if you find Miss DeLaney was under sixteen years of age and that she was driving the car, that was in violation of the law, and if you find that that violation was a proximate cause of the injury to the plaintiff's automobile, it would be your duty to answer the issue 'Yes.'" This is sustained by abundant authority: *Shepard v. R. R.*, 169 N. C., 239; *Paul v. R. R.*, 170 N. C., 231; *Zageir v. Express Co.*, 171 N. C., 692; *Taylor v. Stewart*, 172 N. C., 203; *Hinton v. R. R.*, 172 N. C., 587; *Graham v. Charlotte*, 186 N. C., 649.

In *Construction Co. v. R. R.*, 185 N. C., at p. 45, it is held: "When a trespass committed upon personal property results in an injury less than the destruction or deprivation of the property, or in an action

for a negligent injury to real property, the measure of damages is the reduced market value of the property proximately caused by the negligent act, and the rule generally adopted is to allow the plaintiff the difference between the market value of the property immediately before the injury occurred and the like value immediately after the injury is complete," citing authorities.

The correct and safe rule is the difference between the reasonable or fair market value of the automobile before and after the injury or damage. Ordinarily the value of the property damaged is to be determined as of the time and place of its damage or injury. Proof of its value within a reasonable time under the circumstances of the particular case, before and after the injury is competent. *Newsom v. Cothrane,* 185 N. C., p. 161; 8 R. C. L., 487-8-9.

If the questions complained of were objectionable, like the following: "Immediately after the wreck, what, in your opinion, was that car worth?" the witness cured it by his answer: "The market value had depreciated at least 50% in my opinion." The court also cured it in the charge: "Yet, in the market, the value of it in the market has been depreciated and that is the test, not what it is worth to Mr. DeLaney, not how long it would last, not how much strength it had, but what that automobile in the open market would have sold for immediately before this collision, put on the market and sold by a person under no obligations to sell and bought by a person under no obligations to buy; that is what is meant by its market value." The definition of market value is practically that laid down in *R. R. v. Armfield,* 167 N. C., 464. We think the court met fully the requirements of the law in the charge on damages. On the entire record we can find no prejudicial or reversible error. The facts of the collision were testified to by two witnesses, found to be credible by the jury, and defendant introduced no evidence to the contrary.

No error.

CHARLES D. FOIL ET AL. v. THE BOARD OF DRAINAGE COMRS. OF BIG COLD WATER DRAINAGE DISTRICT NO. 1 OF CABARRUS COUNTY AND W. E. EZZELL.

(Filed 8 December, 1926.)

1. Drainage Districts—Assessments—Drainage Commissioners—Distribution of Surplus Funds—Statutes.

Where a drainage district of a county having assessed the property owners therein for improvements, and when having completed the same there is a surplus in the hands of the county treasurer, the board of drainage commissioners may, upon the exercise of a sound discretion, and

in good faith, determine that the fund on hand is not necessary for further disbursements for the benefit of the district, according to the plan adopted, and distribute the same proportionately among those assessed in accordance with law, especially when such owners have thereto agreed. C. S., 5372(3).

2. Same—Executors and Administrators—Heirs at Law.

Where, after completing a drainage project the drainage commissioners of the district have resolved to distribute a surplus in the hands of the county treasurer to those whose property has been assessed for the purpose, the part thereof of a deceased person, who had conveyed the land, is not an appurtenance to the land so conveyed, but passes as personal property to his personal representative, and not directly to his heirs at law.

APPEAL by defendant, W. L. Ezzell, from *Stack, J.*, at October Term, 1926, of CABBARUS. Remanded.

Controversy without action to determine to whom a fund now under the control of defendant Board of Drainage Commissioners, for distribution, should be paid.

From judgment directing said board to pay said fund to the administrator of M. Foil, deceased, defendant, W. L. Ezzell, appealed to the Supreme Court.

Caldwell & Caldwell for plaintiffs.
Palmer & Blackwelder for defendants.

CONNOR, J. Big Cold Water Drainage District No. 1, of Cabarrus County, N. C., was established in 1913 by a proceeding in accordance with the drainage law of this State. See C. S., chapter 94, Art. 5. The assessment made upon the land included in the district then owned by M. Foil for the benefit of the district was $1,452.33. This sum was paid in cash by him, as landowner, to the treasurer of Cabarrus County; said land was thereby released from liability to be assessed for improvements then contemplated and thereafter made in the said district. C. S., 5352; Pub. Laws 1909, ch. 442, sec. 32; Pub. Laws 1911, ch. 67, sec. 9.

M. Foil has since died, leaving plaintiffs as his heirs at law. On 31 May, 1920, plaintiffs conveyed the land upon which the sum paid by M. Foil was assessed, and which descended to them as heirs at law of M. Foil, to defendant, W. L. Ezzell, who is now the owner thereof.

On 1 January, 1926, all the bonds theretofore issued, and all the debts theretofore contracted by the board of drainage commissioners, for the improvement of lands included in said district, had been paid. There remained in the hands of the treasurer of Cabarrus County, and under the control of said board of drainage commissioners, unexpended, the sum of $6,891.70. At a meeting of the owners of all the lands included

in said district, regularly called by the clerk of the Superior Court of said county, by unanimous vote, the board of drainage commissioners was requested to retain, for emergencies $200 of said sum, and to distribute the remainder, pro rata, "to the people who paid it, and where the lands have changed hands, to such persons as the court may direct."

The board of drainage commissioners have correctly determined that the pro rata share of the amount to be distributed, on account of the assessment paid by M. Foil upon the land then owned by him, and now owned by defendant, W. L. Ezzell, is $418.36.

Plaintiffs contend that this sum should be paid to them as heirs at law of M. Foil; defendant, W. L. Ezzell, contends that it should be paid to him as the present owner of said land, claiming under plaintiffs, who by their warranty deed conveyed to him the land, with all appurtenances thereto; defendant, the board of drainage commissioners is ready and willing to order the treasurer of Cabarrus County to pay said sum to such person or persons as the court may direct.

The court was of opinion that said sum was not an appurtenance to the land, but was personal property, belonging to the estate of M. Foil, deceased. In accordance with this opinion it was adjudged that said board of drainage commissioners be and they were directed to pay said sum to the administrator of M. Foil, deceased. Defendant, W. L. Ezzell, excepted to the judgment, and upon his appeal to this Court assigns same as error.

The treasurer of Cabarrus County held the surplus in his hands on 1 January, 1926, belonging to said drainage district, for future disbursements for the benefit of said district, or subject to the order of the board of drainage commissioners of the district. C. S., 5372, subsec. 3. The board of drainage commissioners, having determined in good faith that it was not necessary to hold said surplus for future disbursements for the benefit of the district, all its bonds and debts having been paid, has the power, certainly upon the request of the owners of all the lands in the district, to distribute said surplus, pro rata, among the persons entitled thereto.

Defendant, W. L. Ezzell, as the present owner of the land enjoys all the benefits which shall hereafter accrue to the land by reason of the fact that it is included within the drainage district. Assessments hereafter made in order to maintain the district, and thus to continue its benefits, will be liens upon all the lands in the district, including the lands of defendant, from and after the date of each assessment. Plaintiffs cannot be held liable to defendant, upon his payment of such assessments, under the warranty in their deed. Such assessments will be in the nature of a tax, the burden of which must be borne by the land which receives the benefits for which the assessments are made. *Drain-*

age Comrs. v. Sparks, 179 N. C., 581; *Pate v. Banks*, 178 N. C., 139; *Taylor v. Drainage Comrs.*, 176 N. C., 224. C. S., 5371, which provides that a grantor, who holds under a warranty deed, and who pays an assessment levied prior to the conveyance to him, shall have a right of action against the warrantor of his title, does not apply to an assessment made after the conveyance, in order to maintain the district, and thus continue its benefits.

The assessment paid by M. Foil was for improvements made long prior to the conveyance of the land to defendant, W. L. Ezzell. It does not appear that any assessment has been made upon the land since its conveyance to defendant, or that he has paid any part of the fund now to be distributed. Defendant took the land, under his deed, with all the benefits which had accrued from the improvements made by reason of the assessment which had been theretofore paid. Any excess in this assessment unexpended and not required for future disbursements cannot be held to be "appurtenances" to the land, which passed to defendant under his deed. The word "appurtenances can have no other or greater meaning than to comprehend things in the nature of incidents to the land." *Helme v. Guy*, 6 N. C., 342. An "appurtenance" has been defined as "a thing which belongs to another thing as principal, and which passes as incident to the principal thing." It must have such relation to the principal thing as to be capable of use in connection therewith. 4 C. J., 1467, and cases cited. In its ordinary sense the term does not embrace personal property. 4 C. J., 1470.

We concur in the opinion of the court, in accordance with which the judgment was rendered. The pro rata share of the amount to be distributed on account of the assessment paid by M. Foil should be paid, as the court directed, to his administrator. It is a part of the personal assets of his estate, and did not pass to plaintiffs as his heirs at law. In no event could it be held that plaintiffs are entitled to the sum, as heirs at law, for if it was part of the land, and descended to them with the land, it would pass by their deed to defendant, W. L. Ezzell.

The administrator, however, is not a party to this controversy. The action is remanded in order that the administrator, with the consent of the parties hereto, may come in and make himself a party to this controversy and receive said sum. The fact that he has filed his final account does not deprive the administrator of his right to receive or to recover an asset of the estate thereafter discovered. When the administrator has been made a party hereto, with the consent of plaintiffs and defendants, a judgment in accordance with the holding of Judge Stack, herein approved by this Court, should be entered, to the end that all parties may be bound by said judgment. If such consent is not given, the administrator should proceed as he may be advised to recover said

sum as an asset of the estate of his intestate. Payment to him as directed by the court, will discharge the liability of the board of drainage commissioners and of the treasurer of Cabarrus County on account of the sum involved in this controversy. Let the action be remanded. It is so ordered.

Remanded.

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF L. A. CRAIG.

(Filed 8 December, 1926.)

Wills—Undue Influence—Evidence—Nonexpert Witnesses.

Evidence is incompetent from a nonexpert witness that the testator, whose will was being tried upon the issue of *devisavit vel non*, was under the undue influence of the wife when making the will in question in her favor. Where undue influence and mental incapacity are in question, it is better to submit each under separate issues.

CIVIL ACTION, tried at May Term, 1926, of CALDWELL before *Lane, J.*, and a jury.

On 20 May, 1925, L. A. Craig executed a last will and testament, devising to his wife, Lillie A. Craig, all of his property and appointing her executrix of the will. The testator left him surviving an only child by a former marriage, to wit, Mrs. Edith Price. The testator had no child by his second wife, Lillie A. Craig. The devisee and executrix, Mrs. Lillie A. Craig, presented the will for probate and obtained letters of administration upon the estate. Thereafter Mrs. Price filed a caveat to said will. Pending the trial of the issue, Mrs. Lillie Craig died intestate, leaving as her heirs at law and distributees her brothers and sisters, who were duly made parties to the proceeding.

The case was tried upon the single issue: "Is the paper-writing propounded for probate, or any part thereof, the last will and testament of L. A. Craig?"

The jury answered the issue no, and the propounders appealed, assigning errors.

Squires & Whisnant and E. B. Cline for propounders.

W. C. Newland, F. A. Linney and Lawrence Wakefield for caveators.

BROGDEN, J. The caveators allege that the testator did not have sufficient mental capacity to make a will, and that said will was obtained by his wife, Lillie A. Craig, and her close relatives by means of undue and improper influence and duress exercised upon the said testator.

This Court has intimated in cases of this kind that it is a better practice to submit separate issues relating to mental capacity and undue influence. *In re Rawlings' Will,* 170 N. C., 58.

A niece of the testator was asked the following question: "From your experience and observation while you were there, and of the deceased, your uncle, I'll ask you whether or not in your opinion he was under the domination, direction and control of his wife."

The witness answered: "Yes, sir, he was."

The propounders excepted to the ruling of the court in permitting the question and answer.

Another witness was asked: "Are you able to state as to whether or not he was under the influence and domination and control of his wife?"

The witness answered: "Not positive."

The propounders excepted to the ruling of the court in permitting the question and answer.

Another witness was asked: "From your experience and observation, have you an opinion as to whether or not he was under the influence and domination and control of his wife, Mrs. Lillie Craig?"

The witness answered: "Somewhat, yes."

The propounders excepted to the ruling of the court in permitting the question and answer.

Another witness was asked: "From your experience and observation visiting that home there, and seeing and judging the relations between Mr. Craig and his wife, have you an opinion as to whether or not she exercised influence over him and he was under her dominion and control?"

Witness answered: "I think so."

The propounders excepted to the ruling of the court in permitting the question and answer. There was other testimony to the same effect.

The law is well settled, that in cases involving the mental capacity of a testator to make a will, that a nonexpert witness, though not a subscribing witness or even present when the will is made, may testify as to the mental condition of a testator if he has had reasonable or adequate opportunity for observation. *Bond v. Mfg. Co.,* 140 N. C., 381; *In re Rawlings' Will,* 170 N. C., 58; *Hyatt v. Hyatt,* 187 N. C., 113. This principle, however, has never been extended by the courts to include opinions as to undue influence.

In *Stewart v. Stewart,* 155 N. C., 341, the caveator was a son by the first marriage, and the propounder was the second wife and chief beneficiary. The following question was asked: "What influence did Cassie Stewart seem to exert over Henry Stewart, Sr.?" The witness answered: "She certainly seemed to do most of the talking, and he seemed to be under her thumb a good deal." The court excluded the question

and answer. *Clark, C. J.,* says: "The question was excluded upon the ground that it was leading. We also think that it was incompetent as the expression of a conclusion which it was the province of the jury to draw upon facts placed before them. The condition of the testator's mind was a matter as to which any one having opportunity for observation can testify, subject to cross-examination to test the value of the opinion expressed by the witness, *Clary v. Clary,* 24 N. C., 78, but whether there was undue influence is a question for the jury to decide from the facts and circumstances placed in evidence . . . But it would not have been competent for the witness . . . to testify that such person had a controlling influence over the testator."

The evidence, therefore, was incompetent and inadmissible, and constitutes reversible error. There are other serious questions presented in the record as to the competency of evidence, but we express no opinion in regard to them for the reason that there must be a new trial for the errors specified, and each party is entitled to have the case tried upon its merits without the embarrassment of intimation from this Court.

New trial.

STATE v. STOKES CHURCH.

(Filed 8 December, 1926.)

1. Criminal Law—Evidence—Declarations—Hearsay.

Upon the trial of an action for unlawfully breaking into a storehouse with the intent to commit larceny, and the commitment of the offense of larceny, etc., where there is evidence that the defendant and another were found carrying a suitcase containing the stolen goods, with other evidence of their guilt, declarations of the other person so found, while escaping arrest, to the effect that he alone had committed the offense, are hearsay and incompetent.

2. Instructions—Verdict—Appeal and Error—Harmless Error.

Where there are several counts of the indictment, and the charge was correct upon those upon which a conviction had been had, the verdict cures error, if any, committed, in not giving the principles of law arising from the evidence upon the count upon which the appealing defendant was acquitted. C. S., 564.

APPEAL by defendant from *Siler, Special Judge,* at July Term, 1926, of CATAWBA.

The defendant and others were prosecuted upon an indictment charging them (1) with unlawfully breaking and entering a storehouse occupied by E. H. Yount & Company with intent therein to commit larceny;

(2) with larceny; (3) with receiving stolen property. He was convicted upon the first and second counts and appealed from the judgment.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

A. A. Whitener, Louie A. Whitener, T. Manly Whitener and Jesse C. Sigmon for defendant.

ADAMS, J. The storehouse was entered and the larceny was committed on 2 June, 1926, at night, and two days later the chief of police in Granite Falls saw the defendant and Charlie Craven walking down a railroad track in Burke County. Each of them carried a suitcase containing a part of the stolen property. When the officer called to them to stop Craven ran, jumped into the river, and escaped; the defendant was arrested and imprisoned, and was afterwards tried and convicted.

Upon the trial the defendant attempted to set up an alibi, and his testimony was corroborated by that of other witnesses. He now contends—the evidence was circumstantial—that he was convicted for the reason that he happened to be found in company with Craven. His explanation is that he carried the suitcase for Craven; and in his examination as a witness he gave his reason for doing so, and insisted that he had not previously been with Craven or with any of the codefendants. He offered to show by the cross-examination of the chief of police and by his own testimony that Craven, as he ran away to escape arrest, said that he was the owner of the two suitcases and the clothing they contained, and that the defendant had no knowledge of their contents. The proposed testimony was excluded and the defendant excepted.

There was no error in the exclusion of this evidence. A confession made, not by the defendant, but by a third person, is not admissible. While authority favorable to the admission of such evidence is not altogether wanting, most of the American courts exclude statements of this character. With us the principle may be regarded as definitely established. In *S. v. May,* 15 N. C., 328, the defendant offered in evidence the confession of William May that he alone was guilty of the crime for which Daniel was prosecuted. In rejecting this evidence *Chief Justice Ruffin* said: "Except the facts of the respective residences of the parties, which of themselves do not tend to establish guilt in either of the parties, it is obvious that all the evidence, as well that received as that rejected, consists of the acts and declarations of other persons, to which neither the State nor the prisoner is privy. I think the whole of it was inadmissible. The confession is plainly so. It is mere hearsay. It may seem absurd to one not accustomed to compare proofs, and estimate the weight of testimony according to the tests of

veracity within our power, that an unbiased confession of one man that he is guilty of an offense with which another is charged should not establish the guilt of him who confesses it, and, by consequence, the innocence of the other; but the law must proceed on general principles, and it excludes such a confession upon the ground that it is hearsay evidence—the words of a stranger to the parties, and not spoken on oath. Indeed, all hearsay might have more or less effect, and from some persons of good character, well known to the jury, it might avail much. Yet it is all rejected, with very few exceptions, which do not in terms or principle extend to this case. Even a judgment upon the plea of guilty could not be offered in evidence for or against another, much less a bare confession. As a declaration of another establishing his own guilt, the confession of a slave might be used upon the same principle. This, I recollect, was attempted in *Owen's case,* and also in *Kimbrough's;* but in the Supreme Court it was abandoned, and the point is not reported." In the same case *Judge Daniel* remarked: "The hearsay declarations of William May, that he committed the crime, were not on oath, nor was there any opportunity for a cross-examination. The evidence, therefore, according to the plainest principles of law, was properly rejected."

The principle is maintained in the later cases of *S. v. Duncan*, 28 N. C., 236, 239; *S. v. White,* 68 N. C., 158; *S. v. Haynes,* 71 N. C., 79; *S. v. Bishop,* 73 N. C., 44; *S. v. Boon,* 80 N. C., 461; *S. v. Gee,* 92 N. C., 756; *S. v. Lane,* 166 N. C., 333. To hold that Craven, who had escaped arrest by flight, should liberate his confederate by the "taunting adieu," "I have done it, turn your sword against me," would introduce a novelty not hitherto recognized in the administration of the criminal law in this State.

The defendant excepted to the charge on the ground that the judge failed to state in a plain and correct manner the evidence in the case and to declare and explain the law arising thereon. C. S., 564. It is insisted that no definition of larceny or of the burglarious breaking was given the jury, and that the essential elements of the crimes were not explained. We have had occasion to say that a statement of the contentions of the parties, together with a simple enunciation of a legal principle is not a sufficient compliance with the statute. *Watson v. Tanning Co.,* 190 N. C., 840. If the charge, otherwise clear, is subject to this criticism the inadvertence was no doubt due to the fact that the defense was an alibi and the alleged impossibility of the defendant's guilt.

The principal question had reference to the defendant's participation in the crimes rather than to their essential elements; but as to the counts on which the defendant was convicted the constituent elements were at least inferentially given in the beginning of the charge. We find

No error.

W. S. EPLEY v. COMMERCIAL CREDIT COMPANY.

(Filed 8 December, 1926.)

Vendor and Purchaser—Automobiles—Contracts — Partial Payments—Tender—Measure of Damages.

Where a credit company to whom a dealer had sold a contract and notes upon a partial payment plan, has possessed and wrongfully sold the car after full payment of arrears had been tendered by the purchaser of the car, the measure of damages in the latter's action is the fair market value of the car at the time of the refusal of the tender of payment, not exceeding the purchase price, less whatever amount he may still be due the seller under the terms of his contract.

APPEAL by defendant from *Schenck, J.*, at March Term, 1926, of McDOWELL. New trial.

The plaintiff sued to recover the amount he had paid on the purchase price of a car, and the following verdict was rendered:

1. In what amount, if any, is plaintiff entitled to recover of defendant, Commercial Credit Company?

Answer: Full amount—$239.77 with interest.

Hudgins, Watson & Washburn for plaintiff.

J. Laurence Jones, J. L. Delaney and Morgan & Ragland for defendant.

ADAMS, J. On 12 September, 1924, the plaintiff and the Old Fort Motor Company mutually executed a conditional sale agreement by the terms of which the plaintiff purchased from the company a Ford touring car at the agreed price of $513.12. He made a cash payment and agreed to pay to the seller or its order $342.12 in twelve monthly installments of $28.51 each, evidenced by his promissory notes. The agreement and the notes were afterwards assigned by the Old Fort Motor Company to the defendant. Some time after the defendant became the holder of the notes and agreement the car was seized by the sheriff of McDowell County under the provisions of C. S., 3403, relating to the prohibition law. It is intimated, though it does not distinctly appear, that the defendant gave a bond to have the car released from the custody of the sheriff. The written agreement contains a provision that upon any default or upon the buyer's losing possession of the car all the unpaid balance of the purchase price should forthwith become due and payable; and it is said that the defendant after getting possession of the car sold it under the terms of the contract. The plaintiff testified that

he had paid on the purchase price the sum of $239.77, that he had tendered the remainder claimed to be due, and that the defendant had refused to accept the payment or to return the car. He brought suit to recover the amount he had paid on the purchase price.

In reference to the issue submitted the trial judge gave the following instruction, to which the defendant excepted: "But, however, should you find on the contrary that he did not cause it to be used or permit it to be used for intoxicating whiskey, and he did make a tender of all the money that was due prior to the sale of the car, then he would be entitled to recover something. The amount he is entitled to recover should be $239.77, or such smaller amount as you find he is entitled to recover. He contends he should recover that entire amount. He says that he paid $234.51 for the car, and that he paid $5.26 for insurance, which was returned by the insurance company, and he contends he should recover the total amount of those two amounts, which is $239.77, and that's the amount he contends he has lost by reason of the fact that the car was wrongfully withheld from him. He contends the car was worth more than $239.77 and, therefore, since he has paid that much, and since the car has been taken away from him he is out that much and has lost all of that amount."

It will be noted that no specific rule is laid down for the measure of the plaintiff's loss. To say that the plaintiff should recover $239.77 or such smaller amount as he should be entitled to is to leave the recovery to the arbitrary judgment of the jury without prescribing any rule as a guide. If the plaintiff paid a part of the purchase price and made a formal tender of the remainder due, and the defendant under these circumstances wrongfully sold the car the measure of the plaintiff's loss would be, not necessarily the amount he had paid, but the fair market value of the car at the time of the defendant's wrongful refusal to return it, in no event to exceed the purchase price, less the remainder due thereon by the plaintiff. *Kellogg v. Malick,* 4 An. Cas. (Wis.), 893; *Russell v. Butterfield,* 21 Wendell, 300; *Boam v. Cohen,* 145 Pac. (Kan.), 559; *Barbee v. Scoggins,* 121 N. C., 135; 11 C. J., 597, sec. 299.

For the error complained of there must be a

New trial.

CHARLIE COCHRAN v. WILL COLSON ET AL.

(Filed 8 December, 1926.)

Tenants in Common—Owelty—Judgments—Limitation of Actions—Notice—Parties.

Where the commissioners to divide lands held by tenants in common award owelty to one of them to equalize his share with the other, the ten-year statute of limitations begins to run from the confirmation of the report by the clerk, approved by the judge, C. S., 3232, and the fact that the clerk has not docketed the judgment in the seven years, as between the parties having at least constructive notice of the proceedings, does not alone repel the bar of the statute. C. S., 3230, 3231.

APPEAL by plaintiff from *Schenck, J.*, March Term, 1926, of STANLY. Reversed.

Motion for leave to issue execution to enforce payment of owelty of partition. From order of clerk, denying motion, plaintiff appealed to the judge. From his judgment confirming the order of the clerk, plaintiff appealed to the Supreme Court.

J. R. Price for plaintiff.
Brown & Sikes for defendants.

CONNOR, J. This is a special proceeding for the partition of land located in Stanly County among tenants in common, commenced by summons dated 27 March, 1916, and returnable before the clerk of the Superior Court of said county. The report of commissioners appointed to make partition of said land, pursuant to judgment entered by consent on 18 February, 1918, was duly confirmed on 22 June, 1918. In their report the commissioners directed that lot No. 3, allotted to defendant, Will Colson, should pay to lot No. 1, allotted to plaintiff, Charlie Cochran, the sum of $250.00 to make an equal division. The report and decree of confirmation were duly recorded, as required by C. S., 3231, on 29 January, 1919. Plaintiff and defendant entered into possession of their respective shares and now own same.

On 13 February, 1926, upon motion of plaintiff, supported by affidavit, notice was issued by the clerk, and thereafter served on defendant, requiring him to show cause, if any he had, why execution should not issue to enforce payment of the owelty of partition. Defendant filed answer, and among other defenses, plead the lapse of seven years from the date on which the report of the commissioners was confirmed, to the date on which the charge for owelty of partition was entered on the judgment docket in the office of the clerk of the Superior Court of Stanly County, under the provisions of C. S., 3232. Defendant admitted that no part of the sum of $250 had been paid. He contended that the

judgment for owelty of partition, now duly docketed as provided by statute, was erroneous, or at least irregular, and prayed to be relieved of said judgment on account of excusable neglect, etc.

Upon the hearing the clerk found that the judgment for owelty was not docketed in his office, on his judgment docket, within seven years from the date of the decree of confirmation of the commissioners' report. No facts were found by the clerk with respect to the other defenses set up in the answer and relied upon by defendant. Upon the finding of fact made by him, the clerk entered an order, denying the motion. Upon plaintiff's appeal to the judge, this order was affirmed, without any further findings of fact by the judge. Plaintiff excepted; upon his appeal to this Court his sole assignment of error is based upon this exception.

Plaintiff's right to enforce payment of the owelty of partition accrued at the date when the report of the commissioners was confirmed. *In re Ausborn,* 122 N. C., 43. This right will not be barred until the expiration of ten years from such date, to wit, 22 June, 1918. *Newsome v. Harrell,* 168 N. C., 295; *Smith, Ex parte,* 134 N. C., 496. Failure of the clerk to docket the owelty of partition upon his judgment docket, as required by C. S., 3232, within seven years after such date, does not affect the right of plaintiff to enforce payment of the owelty by execution. Compliance with the provisions of the statute is not required to protect the right of a party to a proceeding for partition, in whose favor a charge of owelty has been made by the commissioners, and confirmed by the court, certainly as against a party to the proceeding. It is expressly provided in the statute that the docketing of the owelty charges shall not have the effect of releasing the land from the owelty charged in the special proceeding for partition. Defendant, as a party to the proceeding, is fixed with notice of the charge made in the report of the commissioners and confirmed by the decree of the court. He did not except to the report of the commissioners, or file objections thereto during the twenty days which elapsed from the filing of the report to its confirmation.

It was error to deny plaintiff's motion upon the sole finding of fact made by the clerk. We have examined the affidavits and exhibits filed by defendant on the hearing before the clerk. No facts appear therein which sustain the defenses set up in the answer. The decree of confirmation has not been impeached. There was no mistake, fraud or collusion affecting the report of the commissioners or the decree of the court; the decree is binding between plaintiff and defendant. C. S., 3230, and C. S., 3231.

The judgment must be reversed to the end that an order may be entered by the clerk that execution issue in accordance with plaintiff's motion. It is so ordered.

Reversed.

C. H. NANCE v. J. A. AND J. H. HULIN, TRADING AS HULIN BROTHERS.

(Filed 8 December, 1926.)

Bills and Notes—Negotiable Instruments—Endorsers—Mortgages—Partial Payment—Limitation of Actions—Statutes.

Where a chattel mortgage on crops secures the payment of the maker's note and the mortgagee endorses the note, C. S., 441, 3044, and mortgages to another, the bar of the three-years' statute of limitations which has otherwise run will not be repelled by payments on the note from the sale of the crop, as against the endorser, or without evidence of his intent to make the payment and thus impliedly at least acknowledge the debt; and his having attended the mortgage sale of the crop and become a purchaser, is not sufficient.

APPEAL by defendants from *Yount, Special Judge*, at April Term, 1926, of MONTGOMERY. New trial.

On 10 January, 1922, Fradger Little executed his promissory note to the defendants for $489.36, payable 1 November, 1922, and on 10 August, 1922, the defendants duly endorsed the note to the plaintiff. The note was secured by a chattel mortgage (which also was assigned to the plaintiff) on Little's interest in certain crops. On 28 July, 1923, the plaintiff credited on the note $89.30 and $8.25, each sum having been received from the sale of property embraced in the mortgage. The plaintiff testified that J. A. Hulin, one of the defendants, attended the sale and bought corn at the price of $89.30 and potatoes at $8.25. These are the only payments that have been made on the note. The summons was issued on 16 December, 1925.

Brittain, Brittain & Brittain for defendants.

ADAMS, J. The liability of the defendants was that of endorsers and as against them the plaintiff's cause of action was barred by the three-year statute of limitations. C. S., 441, 3044; *Houser v. Fayssoux*, 168 N. C., 1; *Bank v. Wilson, ibid.*, 557; *Dillard v. Mercantile Co.*, 190 N. C., 225. The statute of limitations began to run at the maturity of the note—1 November, 1922. *Triplett v. Foster*, 115 N. C., 335. The action was brought on 16 December, 1925, and is barred unless the alleged payments arrested the running of the statute. The trial judge instructed the jury that if the two payments were credited on the note "by virtue of sales of goods embraced in the chattel mortgage assigned to the plaintiff as security with the knowledge and consent of the defendants the credits would stop the running of the statute and it would run anew from that date." C. S., 416.

This instruction, we think, is subject to exception. In *Battle v. Battle*, 116 N. C., 161, it is said that the effect of a partial payment is not

of statutory origin, but is an exception conceded by the courts, and that such effect is allowed only when the payment is made under such circumstances as will warrant the clear inference that the debtor recognizes the debt and his obligation to pay the remainder due. It is necessary that the payment be voluntary, that it be such as to imply in law that the debtor acknowledges the debt and distinctly promises to pay it; but a payment made under circumstances which repel such implied promise will not stop the running of the statute. *Hewlett v. Schenck,* 82 N. C., 234; *Supply Co. v. Dowd,* 146 N. C., 191; *Kilpatrick v. Kilpatrick,* 187 N. C., 520. In *Bank v. King,* 164 N. C., 303, the defendants executed their note to the plaintiff, a bank, and authorized the cashier to sell certain collateral securities and to apply the proceeds to the payment of the note. On the theory that the debtors had appointed the cashier their agent to sell the securities and to apply the proceeds, and had agreed to remain liable to the holder of the note for any deficiency, it was held that such sale and payment repelled the bar of the statute. The facts are distinguishable from those in the present appeal. It is true that the plaintiff seized the mortgaged property, or a part of it, at the suggestion of the defendants and requested J. A. Hulin to attend the sale and "protect his interest by bidding on the crops"; but Hulin's purchase of the corn and potatoes did not necessarily imply an acknowledgment of his liability or his voluntary payment as an endorser, and the mere entry of the two payments as credits on the note "with the knowledge and consent of the defendants" would not of itself arrest the running of the statute. With or without the consent of the defendants, it was the duty of the endorsee to credit the payments. The element of the intent of the parties seems not to have been considered. The error complained of entitles the defendants to a

New trial.

KATE RITCHIE, ADMINISTRATOR OF EFIRD T. RITCHIE, v. HIGH POINT, THOMASVILLE AND DENTON RAILROAD CO.

(Filed 8 December, 1926.)

1. Negligence—Railroads—Master and Servant—Employer and Employee—Evidence—Nonsuit—Rule of Prudent Man—Questions for Jury.

Evidence that the flagman on defendant railroad company's train saw the deceased at work in the course of his employment under a disconnected box-car on the defendant's track, and about fifteen minutes thereafter signalled the engineer on the train to couple it therewith which resulted in death, is sufficient to take the case to the jury under the rule of the prudent man.

2. Same—Contributory Negligence—Damages—Statutes.

Where there is evidence that the defendant railroad company negligently coupled a box car under which the deceased was at work to its train, causing his death, the fact that the deceased was guilty of contributory negligence in failing to place the customary signals where he was at work, does not entitle the defendant to a judgment as of nonsuit, and the amount of the verdict will be reduced under the doctrine of comparative negligence. C. S., 567.

APPEAL by defendant from *Shaw, J.*, at April Term, 1926, of GUILFORD. No error.

Action to recover damages for wrongful death. Deceased was an employee of defendant, a common carrier, by railroad. The issues answered by the jury were as follows:

1. Was the plaintiff's intestate killed by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

2. Did the plaintiff's intestate by his own negligence contribute to his death, as alleged in the answer? Answer: Yes.

3. What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: $8,275.00.

From judgment upon the verdict, defendant appealed to the Supreme Court.

J. A. Barringer and R. C. Strudwick for plaintiff.

Robeson & Haworth, and Peacock, Dalton & Lyon for defendant.

CONNOR, J. Defendant, upon its appeal to this Court, relies solely upon its assignment of error based upon its exception to the refusal of its motion for judgment as of nonsuit, made at the close of all the evidence. C. S., 567.

Contributory negligence of the deceased, as found by the jury in its answer to the second issue, in failing to place flags or other signals on or beside the track, on which the car under which he was at work was standing, as notice of his presence under the car, to the conductor or engineer on defendant's train, which struck the car, and thereby caused the injuries, does not bar a recovery in this action, if the death of deceased resulted, in whole or in part, from the negligence of an employee of defendant. Deceased at the time he was fatally injured was an employee of defendant, and engaged in the performance of his duties; defendant is a common carrier by railroad. The effect of the answer to the second issue, as the court correctly instructed the jury, was to diminish the damages sustained by plaintiff in proportion to the amount of negligence attributable to deceased; only the damages, thus diminished, were recoverable by plaintiff, upon the affirmative answer to the first issue. C. S., 3466; C. S., 3467.

Plaintiff was injured on 28 October, 1925; he was at the time at work under a car, standing on defendant's track at High Point; the car was struck by an engine which entered upon the track, for the purpose of "coupling up" the car, after the switch had been thrown by the flagman. Neither the conductor nor the engineer on the moving train knew that deceased was under the car standing on the track.

The flagman testified that he had seen deceased at work under the car ten or fifteen minutes before he threw the switch as directed by the conductor; he gave the signal to the engineer to enter upon the track on which the car under which deceased was at work was standing; he did not know that deceased was then under the car; the engine entered upon the track, struck the car and thus caused the fatal injuries to deceased.

This evidence was properly submitted to the jury upon plaintiff's contention that it was negligence for the flagman, an employee of defendant, who had within ten or fifteen minutes seen deceased at work under the car, to signal the engineer to pass over the switch and enter upon the track for the purpose of coupling up the car, without ascertaining whether or not deceased had left a place of such grave danger; and upon her further contention that such negligence was the proximate cause of the death of plaintiff's intestate. The question as to whether or not, under all the circumstances as the jury might find them to be, from the evidence, the conduct of the flagman was that of an ordinarily prudent man, was for the jury to determine, under the instructions of the court. There are no exceptions to the charge of the court, either as to negligence or as to proximate cause; the charge, in full, is set out in the transcript to this Court, and is free from error.

There was no error in refusing the motion for judgment as for nonsuit. The judgment is affirmed.

No error.

STATE v. BURGESS.

(Filed 8 December, 1926.)

Judgments—Criminal Law—Continuance—Appeal and Error—Objections and Exceptions—Waiver.

The defendant, on conviction of a criminal offense, has the right to have the judgment given at the term in which the conviction was had, so as to afford him the right to appeal to the Supreme Court, and it is error for the trial judge to continue the rendition of the judgment to some indefinite future time, under the defendant's exception, and when he has not waived this right.

STATE *v.* BURGESS.

APPEAL from *Harwood, J.*, at August Term, 1926, of BURKE. Remanded.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Wilson Warlick and Spainhour & Mull for defendant.

CLARKSON, J. The defendant was convicted of an assault with a deadly weapon, to wit, an automobile—"a large motor truck."

The judgment of the court below is as follows: "It appearing to the court that a civil action is pending on account of the alleged assault, it is ordered that the judgment be continued upon payment of the costs." Defendant excepts.

C. S., 4650, is as follows: "In all cases of conviction in the Superior Court for any criminal offense, the defendant shall have the right to appeal on giving adequate security to abide the sentence, judgment or decree of the Supreme Court, and the appeal shall be perfected and the case for the Supreme Court settled as provided in civil actions."

It has been uniformly held with us that an ordinary statutory appeal will not be entertained except from a judgment on conviction or some judgment in its nature final. *S. v. Webb,* 155 N. C., 426. The same principle applies ordinarily in civil actions. *Gilliam v. Jones,* 191 N. C., 621.

From the record it appears that defendant excepted to the judgment of the court below being continued. There is no evidence that he waived any right or consented to the continuance. In a case of this character—misdemeanor: In *S. v. Hartsfield,* 188 N. C., p. 357, it is held: "A right arising during the progress of an orderly proceeding may be waived by express consent or by failure to insist upon it in apt time. *S. v. Paylor,* 89 N. C., p. 539." *S. v. Matthews,* 191 N. C., 378; *S. v. Lakey,* 191 N. C., 571. The same principle applies in civil actions. *Armstrong v. Polakavetz,* 191 N. C., 731.

In the present case the prayer for judgment was continued. To this defendant excepted. He had a substantial right that some final judgment be rendered so as to enable him to preserve his right under the law. There was error in continuing the judgment over defendant's objection. It was a right he could, but did not, waive. In *S. v. Crook,* 115 N. C., 760, it is said: "Such orders are not prejudicial but favorable to defendants, in that punishment is postponed with the possibility of escaping it altogether; and it is presumed that the party adjudged guilty is present and assenting to if not asking for such orders. *Gibson v. State,* 68 Miss., 241."

We do not intend to say, however, that a judge of the Superior Court has no power to continue a prayer for judgment from one term

to another, without the defendant's consent, if no terms are imposed and no cost is taxed at the time the prayer is continued. It is sometimes found to be expedient, if not necessary, to continue a prayer for judgment, and the judges of the Superior Court may exercise this power, as above stated, with or without the defendant's consent. Of course with his consent, express or implied, the prayer may be continued or the judgment suspended upon the imposition of terms.

The defendant did not consent to the judgment being continued for an indefinite time, or waive any right, and he is entitled to have the judgment rendered. The case is

Remanded.

A. J. McKINNEY v. NORTH CAROLINA STATE HIGHWAY COMMISSION.

(Filed 8 December, 1926.)

Government—State Highway Commission—Roads and Highways—Condemnation—Damages—Rights and Remedies—Statutes.

The owner of land cannot maintain an action in tort against the State Highway Commission, an unincorporated governmental agency, for damages caused to his land for its having been taken by the commission for highway purposes, and is confined for his remedy to the provisions of the special proceedings of 3 C. S., 3846(bb), 1716.

APPEAL by defendant from *Stack* and *Finley, JJ.*, at July Term, 1925, and April Term, 1926, of MITCHELL.

Civil action instituted in the Superior Court of Mitchell County to recover of the defendant damages for causes alleged in the complaint as follows:

1. For that the defendant has wrongfully entered upon plaintiff's lands and appropriated a part thereof, reasonably worth $350.00, to its own use in the construction of a State highway from Spruce Pine to Bakersville.

2. For that the plaintiff's remaining lands, on account of the wrongful manner in which the defendant has constructed its road, have been greatly damaged to the extent of $150.00, making a total claim of $500 for the land taken and damage to the remaining lands.

At the July Term, 1925, before his Honor, A. M. Stack, judge presiding, the defendant moved to dismiss the action for want of jurisdiction, as the only remedy afforded the plaintiff by the statute was a special proceeding in condemnation under chapter 33 of the Consolidated Statutes. Motion overruled; exception. His Honor then, over the protest of the defendant, ordered a reference in the case. The defendant again excepted.

At the hearing before the referees, the defendant appeared and renewed its motion to dismiss for want of jurisdiction and upon the further ground that the case was not a proper one for reference. Overruled; exception.

Upon the coming in of the report of the referees, in which the plaintiff was awarded damages in the sum of $300.00, the defendant again moved before his Honor, T. B. Finley, judge presiding, to dismiss the action for want of jurisdiction. Motion overruled in accordance with the previous ruling on the same motion; exception. The defendant then lodged a motion to strike out the report of the referees. Motion overruled; exception.

From the judgment affirming the report of the referees, the defendant excepted and appealed.

McBee & Berry, Chas. Hutchins, and Chas. E. Greene for plaintiff.

Attorney-General Brummitt and Assistant Attorney-General Ross for defendant.

STACY, C. J., after stating the case: In *Latham v. Highway Commission*, 191 N. C., 141, the Court held that as the State Highway Commission is an unincorporated agency of the State, charged with the duty of exercising certain administrative and governmental functions, it is not liable to suit for trespass or tort, such as the plaintiff has instituted in the present action. Speaking to the question, it was said that "where a State agency, like the State Highway Commission, is created for certain designated purposes, and a statutory method of procedure provided for adjusting or litigating claims against such agency, the remedy set out in the statute is exclusive and may alone be pursued," citing a number of authorities for the position. The only remedy afforded the plaintiff, and others similarly situated, by express provisions of the statute (3 C. S., 3846(bb) and C. S., 1716) is a special proceeding in condemnation under chapter 33 of the Consolidated Statutes. This remedy is equally available to the owner of the land and the State Highway Commission.

Nor is the position affected by the fact that the defendant has denied plaintiff's title. This circumstance was considered and allowed significance in several actions against municipal or *quasi*-municipal boards or corporations, but we have never extended it to the State Highway Commission.

The plaintiff has misconceived his remedy. The motion to dismiss should have been allowed. Let the cause be remanded with direction that the action be dismissed at the cost of the plaintiff.

Reversed.

PERRY KILLIAN v. WILSON CREEK QUARRY CO.

(Filed 8 December, 1926.)

Negligence—Master and Servant—Evidence—Safe Place to Work—Dangerous Employment—Blasting.

Evidence that the foreman of the defendant failed to perform his duty to reasonably discover that all the dynamite loaded in drills for blasting had exploded, in the absence of the employee, and that plaintiff was injured by one of them unexpectedly exploding under circumstances not reasonably to have been anticipated by him, is sufficient to take the case to the jury upon the issue of defendant's actionable negligence, and deny its motion as of nonsuit. *Cook v. Furnace Co.*, 161 N. C., 39, cited as controlling.

APPEAL by plaintiff from *Lane, J.*, at May Term, 1926, of CALDWELL.

Civil action to recover damages for an alleged negligent injury.

On 28 June, 1924, the plaintiff, while in the employ of the defendant at its rock quarry in Caldwell County, spent the forenoon, as usual, drilling holes in large boulders preparatory to blasting. At noon, as was the custom, the holes were loaded with dynamite and exploded by other employees. It was their duty, or the duty of the foreman, Mr. Rhodes, to examine the rocks for unexploded dynamite before plaintiff went back to drilling in the afternoon. This was not done, or at least soon after the plaintiff began drilling other holes, following the noon blast, he struck an unexploded dynamite cap, which he could not see, and was severely injured.

On motion of the defendant, made at the close of plaintiff's evidence, the court entered judgment as in case of nonsuit, from which the plaintiff appeals.

Squires & Whisnant for plaintiff.
No counsel appearing for defendant.

STACY, C. J., after stating the case: Reversed on authority of *Cook v. Furnace Co.*, 161 N. C., 39.

Reversed.

IN THE MATTER OF THE DETENTION OF WM. J. BELLAMY.

(Filed 8 December, 1926.)

Habeas Corpus—Appeal and Error—Certiorari—Courts—Discretion.

Where the care or custody of children are not involved an appeal to the Supreme Court will not lie from the judgment of the Superior Court in *habeas corpus* proceedings refusing to release one detained, as in

this case, in a private hospital for mental diseases, the remedy being addressed on motion for a *certiorari* to the sound discretion of the appellate court.

APPEAL by petitioner from *Lane, J.*, at May Term, 1926, of BURKE.

This was an application by Dr. Russell Bellamy for the discharge of his brother, William J. Bellamy, a patient confined in a private hospital, Broadoaks Sanatorium, under an order of the clerk of the Superior Court of Burke County, heard upon writ of *habeas corpus* at Morganton, N. C., 22 June, 1926. From an order denying the relief sought, the petitioner appeals.

W. C. Newland for petitioner.
S. J. Ervin and S. J. Ervin, Jr., for respondent.

STACY, C. J. The appeal must be dismissed, for the reason, that, except in cases concerning the care and custody of children, no appeal lies from a judgment in a *habeas corpus* proceeding refusing to discharge a person from custody or confinement, but the remedy, if any, in such a case, is by petition for a writ of *certiorari*, which is addressed to the sound discretion of the appellate court. *S. v. Edwards, ante,* 321; *In re McCade,* 183 N. C., 242; *In re Croom,* 175 N. C., 455.

While this course must be pursued, we deem it not amiss to say that a careful examination of the record, considering it as on writ of *certiorari (S. v. Hooker,* 183 N. C., 763), discloses no error on the part of the learned judge who heard the matter below.

Appeal dismissed.

PAGE TRUST COMPANY ET AL., RECEIVERS OF BANK OF HAMLET, v. T. M. ROSE, W. K. McNEILL AND DAVID EASTERLING.

(Filed 8 December, 1926.)

1. Banks and Banking—Depositors—Debtor and Creditor—Assignment of Assets.

The relation between a bank and its depositor is that of creditor and debtor, and the former may make an assignment of its notes and other assets to secure the deposit in good faith, and in the due course of its business.

2. Same—Principal and Surety—Officers—County Deposits—Statutes.

Where the officers of the bank acting without personal advantage or gain sign as sureties on an obligation of the bank executed to the commissioners of a county in the manner and form required by C. S., 1389,

to secure a deposit for county road purposes, the transaction is valid when unaffected by fraud, and binding upon the receiver afterwards appointed by the court for the bank thereafter becoming insolvent.

3. Same—Directors—Resolutions.

Where the officers of a bank acting in good faith and without personal profit or advantage execute a bond of indemnity for the deposit of county funds, C. S., 1389, it is not required for the validity of the bond that the directors authorize the same by a resolution duly passed in order to protect the rights of the sureties, officers of the bank.

4. Same—Receivers—Creditors—Distribution of Funds.

The sureties on an indemnity bond given by a bank to secure a deposit of county funds required by C. S., 1389, are entitled to the collateral given them by the bank for their protection in becoming such surety, and is available to them in preference to that of a receiver of the bank, thereafter appointed by the court, claiming the proceeds for distribution among the general creditors of the bank, when the transaction has been made by the sureties in good faith and without personal advantage to them.

5. Same—Consideration.

The consideration moving to a bank when its officers without individual benefit become sureties on its indemnity bond given for a county deposit, under the requirements of the statute, is the deposit so obtained.

APPEAL by defendants from *Schenck, J.,* at May Term, 1926, of RICHMOND. Reversed.

Controversy without action to determine title to certain notes of the total face value of $38,128.77. On 8 September, 1925, and prior thereto, said notes were owned by the Bank of Hamlet, as part of its assets.

Plaintiffs contend that as receivers of the Bank of Hamlet, they are entitled to said notes, to be held by them as general assets for distribution among all the creditors of said bank; defendants contend that by virtue of an assignment by said bank, made on 8 September, 1925, they are entitled to said notes, to be held by them under the terms of said assignment. The validity of the assignment, denied by plaintiffs, is the only matter involved in this controversy and presented for decision.

The court was of opinion that the assignment was not valid, and thereupon adjudged that plaintiffs are entitled to said notes, free and clear of any rights, claims or equities therein of defendants. From this judgment defendants appealed to the Supreme Court.

Bynum & Henry for plaintiffs.
Rose & Lyon for defendants.

CONNOR, J. Plaintiffs were on 14 November, 1925, duly appointed receivers of the Bank of Hamlet, which is insolvent; having qualified as such receivers, they are now engaged in the performance of the duties

of their office. On said date, and for some time prior thereto—particularly on 8 September, 1925—defendants were, respectively, president, vice-president, and vice-president and cashier of said bank.

During the month of September, 1925, the board of commissioners of Richmond County proposed to deposit in the Bank of Hamlet, one of the banks located and doing business in said county, the sum of $37,500; this sum was a part of the road fund of Richmond County, then under the control of said board. Before making said deposit, however, and as a condition of making the same, the board of commissioners required the Bank of Hamlet to execute and file with said board a bond in the sum of $37,500, conditioned as follows:

"Now, if the said Bank of Hamlet, Hamlet, N. C., shall well and truly execute the duties imposed upon it, according to law, and on the warrant of the chairman of the board of county commissioners, pay all moneys which shall come into its hands, as county depository, and render a just and true account thereof to the board when required by law or by said board of county commissioners, then this obligation shall be null and void; otherwise to remain in full force and effect."

The requirement by the board of commissioners of the bond was in accordance with the provisions of chapters 503, 603 and 685, Public-Local Laws of 1915. These provisions are in effect the same as that contained in C. S., 1389, with respect to deposit of funds belonging to a county in a bank located and doing business in said county. The bank, before receiving deposits of county funds, is required to execute a bond for the safe-keeping and proper accounting of such funds as may be deposited by the board of commissioners of the county therein, under the authority of the statute.

On 8 September, 1925, the Bank of Hamlet, as principal, and defendants, as sureties, executed a bond in the form required and filed same with said board. Thereupon the board deposited in the Bank of Hamlet the sum of $37,500, which was entered upon the books of the bank to the credit of "Richmond County Road Fund, J. D. Covington, Auditor." The said sum remained on deposit in said bank until the appointment of plaintiffs as receivers, and is now included among the liabilities of said bank.

Contemporaneously with the execution of said bond, the Bank of Hamlet, by David Easterling, its vice-president and cashier, transferred and assigned the notes which are the subject-matter of this controversy, to defendants, T. M. Rose, W. K. McNeill and David Easterling, as security, "to save them harmless for having signed said bond," as sureties of the Bank of Hamlet. The notes were delivered to defendant, T. M. Rose, to be held by him as trustee for himself and his cosureties. This transfer and assignment was made pursuant to an agree-

ment between said bank, acting by its vice-president and cashier, David Easterling, and defendants as sureties on the bond; defendants, in assuming the obligations as sureties for the bank, relied upon said agreement and assignment.

It is expresssly agreed between the parties to this controversy, as appears in the statement of agreed facts:

"7. That on 8 September, 1925, the Bank of Hamlet was a going concern and was regarded by the parties as solvent, and the entire transaction was carried out by T. M. Rose and W. K. McNeill for the use and benefit of the Bank of Hamlet, and in order that the bank might receive the benefit of the deposit of $37,500 being made by the county of Richmond.

8. That neither T. M. Rose nor W. K. McNeill had or derived any personal interest or benefit from the signing of said paper-writing, as surety for the Bank of Hamlet, except as stockholders of the bank.

9. That the said transactions, the execution and delivery of the paper-writing, as well as the delivery of the notes belonging to the Bank of Hamlet, were never approved by any formal meeting of the board of directors of the Bank of Hamlet, and no resolution has been passed by the board of directors authorizing or ratifying the delivery of the notes or the execution or delivery of the paper-writing."

Whether or not a banking corporation, organized and doing business under the laws of this State, has the power, without statutory authority, to transfer or assign any part of its assets as security for one or more of its depositors, is not presented by this appeal. The power of such corporation to so secure a creditor who loans money to the bank is well sustained by authoritative decisions of the courts; it does not seem to have been questioned. The relation between the bank and its depositor is that of debtor and creditor; we perceive no distinction on principle between one who deposits money with a bank, subject to check, and one who loans money to the bank for a definite time, as regards this question. There is no statute in this State forbidding a transfer or assignment by a bank of its property as security for one who is a depositor in the bank. Whether a sound policy forbids such transfer or assignment must be determined by the General Assembly and not by this Court.

In the instant case the Bank of Hamlet, located and doing business in Richmond County, had express authority to protect funds of said county, deposited with it by the board of commissioners, by a bond, with either personal or corporate sureties. The bank has implied power, at least, to pay a reasonable premium to a corporation duly authorized to become surety on its bond; it must be held also that it has power, when required to do so, to protect personal sureties, by

transfer or assignment, in good faith, of assets in value reasonably proportionate to the liability of such sureties, under the bond which is given to protect and thereby secure the deposits, such bond having been authorized and required by statute. The liabilities of the bank are not increased by such assignment and transfer; it has an asset in the deposit to offset its liability. Here the bank received a cash deposit of $37,500, and transferred and assigned, for the purpose of indemnifying the sureties on its bond, authorized by statute, its notes of the face value of $38,128.77. It is manifest that, as the parties to this controversy agree, the transaction was in good faith, and solely for the purpose of securing a desirable deposit for the bank. The transfer and assignment was valid, if made by the bank, acting in its corporate capacity.

The sureties upon the bond were officers of the bank; the transaction was conducted on the part of the bank by its vice-president and cashier, who was also one of the sureties, for whose protection the transfer and assignment was made. The contention that the transaction for this reason was invalid, cannot be sustained. It is agreed that defendants, although officers of the bank, had no personal interest in the transaction and received no personal benefit therefrom. Defendant, David Easterling, as vice-president and cashier, clearly had the power to receive the deposit and in good faith to act for the bank, without express authority from the board of directors, in complying with the lawful requirements of the board of commissioners. The board, as a depositor, is protected not only by the bond, and the obligation thereon of both the bank as principal, and defendants as sureties, but also by the notes transferred and assigned as security for the sureties. A creditor has an equity, which he may enforce, in securities deposited by his debtor with a surety to save the surety harmless by reason of his suretyship. To sustain the contention of plaintiffs would deprive the board of commissioners of additional protection upon which the board may have to rely for the recovery of the full amount of the deposit.

In *Richards, County Treas., v. Osceola Bank,* 79 Iowa, 707, 45 N. W., 294, it was held that the vice-president of a bank, having authority to transact its business, who has given a bond in his official capacity, with himself individually as surety, to secure a deposit of county funds, has the power to afterwards assign to the county treasurer notes belonging to the bank as additional security, though the bond alone may be ample.

In *Ward v. Johnston,* 95 Ill., 215, it was held that a bank, creating an "Investment Department" had authority to transfer to a trustee as security for the funds deposited in the department, certain of its assets in the form of notes, and other collateral. See, however, *Commercial Bank, etc., v. Citizens Trust, etc., Co.,* 153 Ky., 566, 156 S. W., 100,

Ann. Cas., 1915C., 166, where it is held that under statutes in force in Kentucky a bank had neither express nor implied authority to secure the payment of a depositor by pledging its assets, such as notes, etc., and that a pledge thereof is *ultra vires. Citizens Bank v. Bank of Waddy,* 126 Ky., 169, 103 S. W., 249, 128 Am. St. Rep. 282, 11 L. R. A. (N. S.), 598, N., is cited in Morse on Banks and Banking, sec. 160 as authority for the statement in the text that the cashier of a bank has inherent power to borrow money in the regular course of the business of the bank and may secure the loan by note or pledge of the bank's property. In *Cherry v. City National Bank,* 144 Fed., 587, it is held that executive officers of a national bank may, in the usual course of business and without special authority from the directors, rediscount their own discounts or otherwise borrow money for the bank's use.

The transactions out of which the subject-matter of this controversy arose, to wit, the execution and delivery of the bond, authorized by statute, and the transfer and assignment of the notes belonging to the bank, for the purpose of indemnifying the sureties of the bank, on its bond, were valid. The vice-president and cashier had the power, without special authority of the board of directors, to execute the bond, and to transfer and assign the notes, to be held solely for the purpose of saving harmless the sureties on the bond. The bank received the benefit accruing from the transactions *(Trust Co. v. Trust Co.,* 188 N. C., 766). The transfer and assignment of the notes were entirely free from any taint of fraud, bad faith or undue advantage *(Everett v. Staton, ante,* 216); defendants, although officers and directors of the bank, had no personal interest, and received no personal benefit from the transactions *(Everett v. Staton, ante,* 221).

It would be a hard measure in view of changed conditions now to deprive defendants of the protection upon which they relied, in good faith, when, solely for the advantage of the bank, they assumed liability as its sureties. The bank, its creditors, depositors and stockholders, received all the benefits of the transaction; it is no hardship to them to hold that defendants are protected by the security which the bank agreed to give and did give to them before they signed the bond. While it is justly held that officers and directors of a bank will not be permitted to gain personal profit or to secure personal advantage by reason of their official relations to the bank, power to serve the bank, its stockholders and depositors in good faith, without personal loss or discredit, must be conceded to them.

It was error to hold that the assignment was invalid. The judgment must therefore be reversed; judgment should be entered below in accordance with this opinion.

Reversed.

S. F. CREWS ET AL. v. T. W. CREWS ET AL.

(Filed 8 December, 1926.)

1. Mortgages—Title—Possession—Accounting—Rents and Profits.

A mortgage of lands conveys to the mortgagee the legal title subject to the mortgagor's equity of redemption, giving the former the right of entry at any time, either before or after the time of payment due, requiring of him an accounting for the rents and profits for the duration of such possession, unless the writing itself is expressed to the contrary, and a provision in the instrument giving the mortgagee the right of immediate possession adds nothing to its character as a mortgage.

2. Same—Mortgagee in Possession—Accounting—Statute of Limitations.

Where, in accordance with the agreement expressed in the instrument, the mortgagee enters at once into possession of the lands, the mortgagor's right for an accounting arises when the bond the instrument secures has matured and remains unpaid; and his right of action and that of those claiming under him accrues then, and the mortgagor's right of action is barred by a continued peaceful possession by the mortgagee for ten years therefrom. C. S., 437(4). C. S., 432, does not apply.

3. Same—Adverse Possession.

It is not required that the possession of the mortgagee be adverse in order to bar the mortgagor's action in ten years, under the provisions of C. S., 437(4).

4. Tenants in Common—Mortgages—Ouster—Limitation of Actions.

Where a mortgage is made to a tenant in common by the other tenants therein, it is an ouster that puts them to their action and commences the running of the Statute of Limitations, either under seven years color, C. S., 428, or under twenty years otherwise. C. S., 430.

5. Issues—Evidence—Tenants in Common—Mortgages—Ouster—Limitation of Actions.

Where the plaintiffs seek to be let into the possession of lands as tenants in common, and it appears without conflicting evidence that the defendants have been in peaceful possession of lands under a mortgage from their ancestor for more than thirty years after ouster, no issue of fact is raised for the determination of the jury.

APPEAL by defendants from judgment of *Webb, J.*, at June Term, 1926 of ROCKINGHAM. Error.

Plaintiffs pray judgment in this action that they be declared tenants in common with defendants of the land described in the complaint, and that they be let into possession by defendants, who are now in possession of the land; that certain of plaintiffs be permitted to redeem said land from a mortgage executed by those under whom they claim in part to the father of defendants, now dead, by paying the amount due on the bond secured by said mortgage; and that they recover of defendants, heirs at law of the mortgagee, rents and profits which they have received from said land.

Defendants deny that plaintiffs have any right, title or interest in or to said land; they plead the Statutes of Limitations, C. S., 430, 437(4), in bar of the action of plaintiffs, either for redemption or for recovery of any interest in said land.

The issues, answered by the jury, were as follows:

"1. Are the plaintiffs and defendants the owners in fee as tenants in common of the land described in the complaint? Answer: Yes.

2. Is the plaintiff's cause of action barred by the Statute of Limitations, as alleged in the answer? Answer: No.

3. Did the plaintiffs on or about 25 April, 1924, tender the money ($124.43) in cash to T. W. Crews, administrator of George E. Crews' estate, in payment of the note and mortgage referred to in the complaint, as alleged therein? Answer: Yes.

4. What amount, if any, are the plaintiffs entitled to recover of the defendants, for rents and profits? Answer: $195.00.

From judgment upon the verdict defendants appealed to the Supreme Court.

J. M. Sharp and W. R. Dalton for plaintiffs.

P. W. Glidewell, J. L. Roberts and Humphreys & Gwyn for defendants.

CONNOR, J. In 1858, Nathaniel Vernon conveyed the land described in the complaint to three brothers, John Crews, Joseph Crews and William Crews. They entered and remained in possession of said land, as tenants in common, until April, 1885. On 23 April, 1885, John Crews and Joseph Crews, by deed conveyed the land to their brother, George E. Crews. This deed contains the following clause:

"Provided, nevertheless, that said John S. Crews and Joseph Crews, of first part, their heirs, executors and administrators shall well and truly pay or cause to be paid to the said George E. Crews, party of the second part, his heirs, executors, administrators and assigns, the sum of thirty dollars and twenty cents, according to the condition of a certain bond payable on 25 December, 1885, bearing date herewith, then this deed to be null and void; otherwise to remain in full force and effect. But if default shall be made in the payment of said sum of money or the interest or any part thereof at the time hereinbefore specified for the payment thereof the said parties of the first part do agree that the said party of the second part shall quietly remain on said premises and possess all legal power over the same till said debt is fully settled, the second party to have usual notice of renters when he has to leave said premises."

George E. Crews went into the actual possession of said land on 23 April, 1885, and remained continuously in such possession until his

death in 1922. Defendants, as his heirs at law, continued and are now in possession of said land. The bond referred to in said deed from John Crews and Joseph Crews to George E. Crews and payable to George E. Crews was not paid at its maturity on 25 December, 1885; no sum has since been paid on said bond. It is now in the possession of the defendant administrator of George E. Crews. Summons in this action was issued on 31 May, 1924.

John Crews, Joseph Crews and William Crews, grantees in the deed from Nathaniel Vernon, dated 1858, are dead. Certain of plaintiffs are heirs at law of John Crews and of Joseph Crews. William Crews died in 1891. He left no lineal descendants; his brothers and sister were his heirs at law. They are all dead. Plaintiffs and defendants, children of such deceased brothers and sister, are now the representatives of their deceased parents.

Plaintiffs, who are heirs at law of John Crews and of Joseph Crews, contend that they have the right now to redeem the two-thirds undivided interest in said land, which was conveyed by the mortgage deed of John Crews and Joseph Crews to George E. Crews, and that they are the owners of said two-thirds undivided interest, subject to said mortgage deed. Plaintiffs further contend that as representatives of all the heirs at law of William Crews, except George E. Crews, father of defendants, they are tenants in common of an undivided one-third interest in said land with defendants, who are the representatives of said George E. Crews. They demand that they be let in possession with defendants, according to their respective interests in the land, as set out in the complaint.

Defendants contend that plaintiffs are not entitled to recover in this action, first, for that the action to redeem is barred by the Statute of Limitations, C. S., 437(4); second, for that the action by plaintiffs to recover possession as tenants in common, claiming under William Crews is also barred by the Statute of Limitations, C. S., 430. Defendants contend that by virtue of said statute they are the owners of the one-third undivided interest in said land formerly owned by William Crews, as well as of the two-thirds undivided interest therein conveyed by John Crews and Joseph Crews to their father, George E. Crews, by the deed dated 23 April, 1885.

The court was of opinion that although the deed from John Crews and Joseph Crews to George E. Crews, dated 23 April, 1885, was a mortgage, the action of plaintiffs, heirs of the mortgagors, to redeem the land from the mortgage, was not barred by the Statute of Limitations, because of the stipulation in the defeasance clause with respect to the mortgagee's possession. Defendants excepted to an instruction to the jury in accordance with this opinion, and assign same as error. This assignment of error must be sustained.

The stipulation in the clause of defeasance, contained in the mortgage deed, with respect to the mortgagee's possession of the land, conferred upon him no rights which he did not have by virtue of his title to the land as mortgagee. He had the right, certainly with the consent of the mortgagors, to enter into possession of the land prior to default in the payment of the bond secured by the mortgage. He had the right to remain in possession after such default. The effect of the stipulation was merely to recognize this right, and at most to give the consent of the mortgagors to its exercise by the mortgagee. It gave him no other or further right which he thereafter enjoyed than the law gave him by virtue of his legal title to the land as mortgagee. It is true, that, by virtue of the stipulation, if the debt had been paid, he would have been entitled to notice from the mortgagors as provided therein before he was required to surrender possession. But the debt was not paid, and upon the admissions in the pleadings and upon all the evidence, he went into and remained in possession as mortgagee. Notwithstanding the terms of the stipulation, the mortgagee in possession was accountable to the mortgagors for rents and profits which he received while in possession, both before and after default. The right of action, for an accounting and for redemption accrued to the mortgagors on the date of the maturity of the bond secured in the mortgage, to wit, 25 December, 1885; it continued thereafter for ten years, during which time the mortgagee was in actual possession of the land. From said date to the date on which this action was begun, to wit, 31 May, 1924—more than thirty-eight years—the mortgagee and defendants, who claim under him, were in the actual possession of the land. No demand for an accounting was made, nor was any action for redemption begun by either. Joseph Crews, who died on 30 September, 1894, or John Crews, who died on 26 November, 1905. Their brother, George E. Crews, to whom they had conveyed the land by the mortgage deed on 23 April, 1885, died on 16 October, 1922. No offer to pay the bond secured by the mortgage deed and thus redeem the land was made by plaintiffs as heirs at law of John Crews and of Joseph Crews until 24 April, 1924. Upon the facts, the action of plaintiffs, heirs at law of John Crews and of Joseph Crews is barred by C. S., 437(4). Defendants, claiming under George E. Crews, are now the owners of the two-thirds undivided interest in said land, conveyed by John Crews and Joseph Crews to George E. Crews by the mortgage deed dated 23 April, 1885.

In *Weathersbee v. Goodwin*, 175 N. C., 234, *Walker, J.*, says that it is familiar learning that at least after default of the mortgagor in paying the debt secured by the mortgage, the mortgagee is entitled to the possession and is accountable to the mortgagor for rents and profits.

The doctrine as stated in 27 Cyc., 1234 (see 41 C. J., 608) is therein approved. "By the strict doctrine of the common law, a mortgagee is entitled to the immediate possession of the mortgaged premises, in the character of the legal owner, and therefore unless his right in this respect is waived or controlled by stipulation in the mortgage, he may even before breach of condition take possession and oust the mortgagor." The common-law rule, that a mortgage carries the legal title to the mortgagee which he holds in trust for the security of his debt, has not been changed by statute, or abrogated by decisions of the courts in this State. It has been adopted and enforced, as will appear by reference to many of our decisions. See *Trust Co. v. White*, 189 N. C., 281; *Stevens v. Turlington*, 186 N. C., 191; *Bank v. Sauls*, 183 N. C., 167; *Lowdermilk v. Butler*, 182 N. C., 510; *Pridgen v. Long*, 177 N. C., 189; *Jones v. Williams*, 155 N. C., 179; *Dameron v. Eskridge*, 104 N. C., 621; *Williams v. Teachey*, 85 N. C., 402.

While the legal title to the property conveyed by the mortgage vests, by virtue of the conveyance, in the mortgagee, who is thereby entitled to possession, either before or after breach of condition, in the absence of stipulations in the mortgage to the contrary, possession presumed by virtue of C. S., 432, is not sufficient to meet the requirements of C. S., 437(4), for although more than ten years have passed since the cause of action accrued, an action for redemption, under C. S., 437(4), is not barred, unless the mortgagee has during said time been in the actual possession of the land conveyed by the mortgage. It has been expressly held that such possession must be actual, that constructive possession, or possession presumed by virtue of the statute is not sufficient. *McNair v. Boyd*, 163 N. C., 478; *Cauley v. Sutton*, 150 N. C., 330; *Simmons v. Ballard*, 102 N. C., 105. Where the mortgagee is in the actual possession of the land conveyed to him by the mortgage deed, when the cause of action for redemption accrues or where he thereafter goes into and remains continuously in such possession for more than ten years, before an action to redeem is commenced, the statute of limitations, where pleaded and relied upon in the answer, is a complete defense. *Bernhardt v. Hagamon*, 144 N. C., 526. This principle is applicable upon the facts of the instant case. We must therefore hold that it was error for the court to instruct the jury that if they believed all the evidence, they should answer the second issue, "No."

The principle stated in *Rouse v. Rouse*, 167 N. C., 208, and in other cases cited and relied upon by plaintiffs in their brief, to wit, that the statute of limitations will never commence to run in favor of the trustee of an express trust against the beneficiary thereof before the duties of the trust have been fully performed, and the trust has terminated—is not applicable in this case. By the express terms of the statute, C. S.,

437(4), an action by a mortgagor for the redemption of the mortgage, where the mortgagee has been in possession is barred unless said action is commenced within ten years after the cause of action accrues. The possession required by the statute is not adverse, but it must be actual, and not merely constructive. The mortgagee enters into possession by virtue of the mortgage and holds under his mortgagor, for the security of his debt. *Weathersbee v. Goodwin,* 175 N. C., 234. Upon the maturity of the debt, the mortgagor has the right to redeem, by paying the debt. This is his legal right of redemption, and may be enforced by a civil action. After the maturity of the debt, if he makes default in payment, he may still redeem by paying the debt. This is his equity of redemption and may be enforced, prior to foreclosure, by a civil action. *Stevens v. Turlington,* 186 N. C., 191. The action, however, to enforce his equity of redemption is barred after the lapse of ten years, from the date on which his cause of action accrued, where the mortgagee has been in the actual possession of the land. In the instant case, the cause of action for redemption of the mortgage accrued on 25 December, 1885; the debt secured was not paid at maturity; the mortgagee was then in the actual possession of the land; he and defendants, who claim under him, remained in such possession until this action was commenced on 31 May, 1924. The debt has not been paid. Plaintiffs are not entitled to recover of defendants the undivided two-thirds interest in the land which John Crews and Joseph Crews conveyed to George E. Crews by their mortgage deed dated 23 April, 1885.

When George E. Crews entered into possession of the land under the mortgage deed executed by John Crews and Joseph Crews, in April, 1885, William Crews owned as tenant in common with John Crews and Joseph Crews an undivided one-third interest in the land. William Crews died intestate. In the absence of evidence that he had conveyed, or had been divested of such interest prior thereto, it descended at his death to his heirs at law, as tenants in common, all of whom are now dead. There is no evidence that either of these heirs at law had conveyed or been divested of his interest in said land, or had devised the same by a last will and testament. Upon the admission in the pleadings and upon all the evidence, plaintiffs and defendants are the representatives of said heirs at law. They therefore own said undivided one-third interest in said land, as tenants in common, unless defendants and George E. Crews, under whom they claim, have possessed said land, under known and visible lines and boundaries adversely to all other persons for twenty years, or under color of title, for seven years, prior to the commencement of this action; such possession, so held, for such duration of time, will give to defendants a title in fee to said land, against plaintiffs, and all other persons not under disability. No action

to recover said land, or any interest therein can be maintained by plaintiffs, if defendants have thus acquired title in fee to said land. C. S., 428 and 430.

Upon all the evidence defendants and George E. Crews have been in possession of said land for more than twenty years under known and visible lines and boundaries; George E. Crews, from 1885 to his death in 1922 was in the continuous, uninterrupted possession of said land; defendants, his heirs at law have continued such possession since his death to the commencement of this action. During all these years, neither William Crews, so long as he lived, nor any one claiming under him, after his death, made any claim or demand upon George E. Crews or the defendants for said land or for any interest therein. In April, 1924, plaintiffs caused notice to be served on defendants that they then desired to pay the bond due 25 December, 1885, and thus redeem said mortgage.

John Crews and Joseph Crews owned, each, an undivided one-third interest in the land, at the time they executed the mortgage deed to George E. Crews, to wit, on 23 April, 1885. The said mortgage deed on its face conveyed the entire tract of land to George E. Crews, who at once entered into possession thereof under said deed.

It was held by this Court in *Gill v. Porter,* 176 N. C., 451, that where the grantee of a tenant in common of the entire tract of land, enters into possession of the whole thereof, the Statute of Limitations begins to run against all of the tenants in common or their grantees from that time, and that the position that such grantee acquired only the undivided interest of his grantor in the land is untenable, being contrary to the express terms of the conveyance and to the character of the possession thereunder. The fact that the land was conveyed in this case by a mortgage deed does not affect the application of this principle, for the legal title passed to and vested in the mortgagee by the conveyance, subject only to the right of redemption, legal and equitable, in the mortgagors. *Stevens v. Turlington, supra; Stewart v. Lowdermilk,* 147 N. C., 584; *Edwards v. Tipton,* 85 N. C., 480.

This Court has held that a deed by one tenant in common, conveying to his grantee the entire estate in the land, is not color of title as against his cotenants, so that possession under such a deed by the grantee, and those who claim under him, for seven years, does not bar an action by cotenants to be let into possession of the land, according to their respective interests. *Lumber Co. v. Cedar Works,* 165 N. C., 83, and cases cited. "In such cases, twenty years of adverse possession, under a claim of sole ownership, is required to bar the entry of the other tenants, under the presumption of an ouster from the beginning raised thereby."

Lumber Co. v. Cedar Works, 168 N. C., 344. The principle supported by authoritative decisions of this Court is as follows:

Where the grantee of a tenant in common, who enters into possession under a deed conveying to him the entire tract of land and those who claim under such grantee, have been in the exclusive, quiet, and peaceable possession of the whole of said land, for twenty years or more, the law presumes that there was an actual ouster, not at the end of the period, but at the beginning, and that the subsequent possession was adverse to the cotenant who was out of possession. *Bradford v. Bank,* 182 N. C., 225; *Alexander v. Cedar Works,* 177 N. C., 137; *Lester v. Harward,* 173 N. C., 83; *Cooley v. Lee,* 170 N. C., 18; *Lumber Co. v. Cedar Works,* 168 N. C., 344; *Lumber Co. v. Cedar Works,* 165 N. C., 83; *McKeel v. Holloman,* 163 N. C., 133; *Dobbins v. Dobbins,* 141 N. C., 210; *Bullin v. Hancock,* 138 N. C., 198; *Breeden v. McLaurin,* 98 N. C., 307; *Hicks v. Bullock,* 96 N. C., 164; *Black v. Lindsay,* 44 N. C., 467; *Cloud v. Webb,* 15 N. C., 290, *S. c.,* 14 N. C., 315. See *Power Co. v. Taylor,* 191 N. C., 329.

In *Lester v. Harward, supra,* it is said that under our decisions exclusive possession for twenty years by one tenant and those who claim under him, raises a presumption of an ouster, and unexplained will bar an action by the other tenants. This principle is applicable to the instant case.

All the evidence offered by the plaintiffs is to the effect that George E. Crews entered into possession of the entire tract of land in April, 1885, under the mortgage deed executed by two of the three tenants in common, conveying to him the entire tract of land; that he remained in possession until the maturity of the bond secured by the mortgage, on 25 December, 1885, and thereafter continued in the exclusive quiet and peaceable possession of the whole thereof until his death in 1922; that defendants, as his heirs at law continued in such possession until the commencement of this action. No explanation of such possession appears from the evidence, requiring that issues be submitted to the jury in this case.

Defendants' motion at the close of plaintiffs' evidence for judgment dismissing the action as of nonsuit, should have been allowed. The assignment of error based on the exception to the refusal of such motion must be sustained. The judgment is reversed, and the verdict set aside, and the action remanded that judgment in accordance with this opinion may be entered.

Error.

R. L. SMITH, EXECUTOR OF M. F. NESBIT, DECEASED, v. W. F. SMITH, J. T. SMITH ET AL.

(Filed 8 December, 1926.)

Wills—Devise—Shares of Stock—Specific and General Legacies.

Whether the accretions of stock dividends are to go under a devise of the original shares to the person specified therein, depends under a correct interpretation of the related items of a will upon whether the devise is general or specific, and where so construed the identity of the shares bequeathed to the specific beneficiaries and owned by the testator at the time, is established, the devise is specific and the accretions accompanying it are a part of the gift itself.

CIVIL ACTION, before *Bryson, J.*, at May Term, 1926, of IREDELL.

M. F. Nesbit, the testator, died during the year 1907. The plaintiff, R. L. Smith, duly qualified as executor of the estate of said decedent. The wife of said testator, Frances E. Nesbit, died 29 December, 1925.

At the time of his death the testator owned sixty shares of the capital stock of the Mooresville Cotton Mills. In January, 1917, and subsequently thereto, said Mooresville Cotton Mills declared stock dividends, which have been delivered to the executor, until there are now three hundred and sixty shares of common stock of said mill and twenty shares of preferred stock. Upon the death of the widow, Mrs. Frances E. Nesbit, in 1925, the legatees to whom said stock was bequeathed by the testator, claimed the stock together with the dividends. The residuary legatees claimed the stock dividends upon the theory that the legacies were general and not specific.

The pertinent portions of the will of the testator are as follows:

"I, M. F. Nesbit, of the county and State aforesaid, being of sound mind, but considering the uncertainty of my earthly existence, do make and declare this my last will and testament. . . .

"4th. I give, bequeath and devise unto my wife, Frances E. Nesbit, all the balance and residue of my estate, wherever situated, and whatever it may consist of, whether real, personal or mixed, to hold during her natural life, said income to be hers absolutely. I further direct that in the event the income therefrom shall not be sufficient to provide for all her comforts and necessities, then my executor is hereby authorized to sell so much of my estate as is hereby devised and bequeathed by this item as shall be necessary to meet the demands for the necessity and comfort of my said wife.

"5th. I will and direct that all my property shall remain as it is now under the direction of my wife, Frances E. Nesbit, so long as she shall live, and after her death, my property shall be distributed as provided in the items following: . . .

"10th. I bequeath unto Nannie Lee Kerr Nesbit twenty shares of the capital stock of the Mooresville Cotton Mills, Mooresville, N. C.

"11th. I bequeath unto Alice Lee Nesbit Neikirk ten shares of the capital stock of the Mooresville Cotton Mills, Mooresville, N. C.

"12th. I bequeath unto my nephew, Fred Nesbit Porter, ten shares of the Mooresville Cotton Mills, Mooresville, N. C.

"13th. I bequeath to Barron P. Smith ten shares of the Mooresville Cotton Mills, Mooresville, N. C.

"14th. I bequeath unto my nephew, Lee Parker, ten shares of the Mooresville Cotton Mills, Mooresville, N. C. . . .

"19th All the balance and residue of my estate, after the death of my wife, Frances E. Nesbit, shall be equally divided among Margaret Smith, Euphemia Parker, Mary Nesbit, the children of Isabella Kerr, deceased, are to get only so much under this will as their mother would have gotten were she living, this being one-sixth of the radius of my estate, Robert Porter and Janie Porter. All the real estate remaining shall be sold by my executor and the money equally divided as provided in this item.

"20th. It is distinctly understood, and I do hereby direct, that no devise nor bequeath made under this will and testament, to any person other than my wife, Frances E. Nesbit, shall take effect nor be operated until the death of my said wife, Frances E. Nesbit.

"21. I hereby constitute and appoint my nephew, R. L. Smith, my lawful executor to all intents and purposes, to execute my last will and testament, according to the true intent and meaning of same, and every part and clause thereof—hereby revoking and declaring utterly void all other wills and testaments made by me heretofore."

This action was brought by the executor to have said will construed, and *Bryson, J.,* rendered the following judgment:

"This cause coming on to be heard before his Honor, T. D. Bryson, judge, and jury, and the jury for their verdict having answered the issues submitted to them in favor of the plaintiff, as set out in the record.

"The parties to this action, the same being for the interpretation of the will of M. F. Nesbit, deceased, having agreed that the case may be heard upon the facts as stated in the plaintiff's complaint, as an agreed case, which agreement appears in the record.

"It is therefore considered, ordered and adjudged upon the verdict of the jury, that M. F. Nesbit, the testator, bequeathed a one-sixth of the residue of his estate to Jane Porter Byrum, as alleged in the complaint.

"That upon the facts agreed, as set forth in the complaint, it is considered, ordered and adjudged that the 20 shares of the capital stock of the Mooresville Cotton Mills bequeathed to Nannie Lee Kerr Nesbit

in item 10 of the will is the property of the said Nannie Lee Kerr Nesbit, and all stock dividends declared thereon, as set forth in the complaint; that the ten shares of the capital stock of the Mooresville Cotton Mills, mentioned in item eleven of said will and the stock dividend of said corporation as set forth in the complaint is the property of the heirs at law of the said Alice L. Nesbit Neikirk; that the ten shares of the stock of the Mooresville Cotton Mills bequeathed to Fred Nesbit Porter under the twelfth item of said will, and the stock dividends declared thereon, as alleged in the complaint, is the property of the heirs at law of the said Fred Nesbit Porter, deceased, as set forth in the complaint; that the ten shares of the capital stock of the Mooresville Cotton Mills, bequeathed to Barron P. Smith in the thirteenth item of said will, and the stock dividends issued thereon by said corporation, is the property of the said Barron P. Smith, as alleged in the complaint; that the ten shares of the capital stock of the Mooresville Cotton Mills, bequeathed to Lee Parker in item 14 of said will was revoked, and said ten shares of stock by the codicil to said will was bequeathed to F. E. Nesbit, and that the said F. E. Nesbit is the owner of said stock and the stock dividends declared thereon, as set forth in the complaint.

"It is further considered, ordered and adjudged that R. L. Smith, executor of M. F. Nesbit, deceased, who holds the stock dividends, aforesaid, as executor aforesaid, shall cause the same to be transferred and delivered to the above-named defendants, according to their respective interests, as hereinabove declared were entitled to the original shares of stock and the stock dividends declared thereon.

"The cost of the action to be taxed against R. L. Smith, executor of M. F. Nesbit, deceased, by the clerk of this court."

From the foregoing judgment the defendants, residuary legatees, appeal.

Turner & Turner for plaintiffs.

Armfield, Sherrin & Barnhardt for defendants, residuary legatees.

BROGDEN, J. Are the legacies of stock contained in Items 10, 11, 12, 13 and 14 of the will specific or general?

If they are general legacies the stock dividends would constitute a part of the general estate of the testator, and, after the administration of the estate, pass to the residuary legatees. If, upon the other hand, the legacies are specific, the legatees named are entitled to said stock dividends by virtue of the fact that said stock dividends are accretions to the stock bequeathed by the testator. "Specific legacies carry with them all accessions by way of dividend or interest that may accrue after

the death of the testator, unless the will specifies otherwise." *Palmer v. Palmer's Est.,* 75 Atlantic, 130; *Perry v. Leslie,* 126 Atl., 340; *Gordon v. James,* 86 Miss., 719; 1 L. R. A. (N. S.), 461.

In *Graham v. Graham,* 45 N. C., 297, *Battle, J.,* defined a general legacy as follows: "A legacy is said to be general when it is so given as not to amount to a bequest of a specific part of a testator's personal estate; as a sum of money; generally or out of the testator's personal estate and the like. 1 Roper on Leg., 256. In the same case a specific legacy was defined as follows: 'A specific legacy is defined to be "the bequest of a particular thing or money specified and distinguished from all other of the same kind, as of a horse, a piece of plate, money in a purse, stock in the public funds, a security for money, which would immediately vest with the assent of the executor." ' 1 Roper on Leg., 149. A specific legacy has been further defined as 'one that can be separated from the body of the estate and pointed out so as to individualize it, and enable it to be delivered to the legatee as a thing *sui generis.* The testator fixes upon it, as it were, as a label, by which it may be identified and marked for delivery to the owner.' " *Harper v. Bibb,* 47 Ala., 547.

In determining whether a legacy of shares of stock is specific or general, the whole will must be considered and not merely the clause containing the gift or legacy. *Blair v. Scribner,* 57 Atl., 324; *McGuire v. Evans,* 40 N. C., 269; *Graham v. Graham,* 45 N. C., 297; *Perry v. Leslie,* 126 Atl., 340.

The definitions of the terms are well settled, but the difficulty arises in applying the definitions to a given state of facts. "The leaning of the courts is against construing doubtful terms into a specific gift, because the gift is lost upon the failure of the fund, from any cause; and also, because it is not subject to the equitable principle of equality by abatement. It must be clear, therefore, upon the will, that nothing is meant but a particular thing, or a part of a particular thing, existing in specie at the making of the will or when it is to take effect. If the words will be satisfied by any thing of the same kind, not owned by the testator, the legacy is general. The difference may be illustrated by the common case of a contract to sell and deliver goods of a common kind, say one hundred barrels of corn, upon which the remedy is by action for damages for not delivering, and a contract to sell a certain hundred barrels, as a distinct parcel in a crib, which vests the property, and gives trover or detinue upon refusal to deliver." *Ruffin, C. J., Perry v. Maxwell,* 17 N. C., 503.

There are, however, certain well defined indicia of specific legacies. These may be classified as follows:

1. The testator must actually own the property bequeathed at the time the will is made. *Heath v. McLaughlin*, 115 N. C., 398.

2. The property must be described as belonging to the testator. This ownership is usually expressed by such words as "my," "standing in my name," "in my possession," "which I now hold," "owned by me." *Perry v. Maxwell*, 17 N. C., 503; *Davis v. Cain*, 36 N. C., 309; *Howell v. Hooks*, 39 N. C., 188; *McGuire v. Evans*, 40 N. C., 269; *In re Wiggins*, 179 N. C., 326; *Kearns v. Kearns*, 76 Atl., 1042; *Rogers v. Rogers*, 48 S. E., 176.

In applying the pertinent principles established by the authorities, it is necessary to inquire whether or not there are any words in the will bearing upon the legacy which are indicative of present ownership or possession of the stock bequeathed. The word "my," which has been held to be sufficient to designate a specific legacy, receives its force from the fact that it indicates present ownership or possession of the thing bequeathed. Therefore, it is necessary to determine whether or not there are words in the will indicating present ownership or possession of the stock bequeathed by the testator.

Item 5 of the will is as follows: "I will and direct that all *my property* shall remain as it is now under the direction of my wife, Frances E. Nesbit, so long as she shall live, and after her death *my property* shall be distributed as provided in the items following." The items in which the stock in the Mooresville Cotton Mills were bequeathed are "items following," to wit, 10, 11, 12, 13 and 14 of the will. Obviously, item 5 must be read in connection with items 10, 11, 12, 13 and 14 of the will. Thus, it would seem clear that in item 5 the references to "my property" indicate that the testator owned the stock in the Mooresville Cotton Mills at that time and was in possession thereof and intended that it should vest in the legatees named upon the death of his wife, Frances E. Nesbit.

The defendants rely upon the case of *McGuire v. Evans*, 40 N. C., 269. In that case the testator bequeathed "twenty shares of capital stock of the Bank of Cape Fear" to John K. McGuire. *Nash, J.*, speaking for the Court, says: "If the answer to this question depended alone upon the words used in making the bequest, we should, without hesitation, pronounce the legacies general. . . . To render such a bequest specific, it is essential that the testator, in the will, in connection with the bequest, should refer to the stock he then has, or express the intention, that it should come out of that stock. If such intention does clearly appear from the will itself, his intention will make the bequest specific."

In the *McGuire case, supra*, the Court held that the bequest of twenty shares of the capital stock of the Bank of Cape Fear, in the third clause

of the will, was made specific by language appearing in the fourteenth clause thereof. After referring to the fourteenth clause of the will, *Justice Nash* says: "There can be no doubt what stock the testator meant. He meant, evidently, the stock he then had; and if so, they are specific legacies—not general." *Heath v. McLaughlin,* 115 N. C., 398.

Our conclusion is, upon the whole record, that the legacies of stock in the Mooresville Cotton Mills were specific, and that the stock dividends accruing upon said shares belong to the legatees named.

Affirmed.

STATE v. R. F. SIMMONS AND E. S. SMITH.

(Filed 8 December, 1926.)

Homicide—Spirituous Liquors—Intoxicating Liquors—Arrest—Statutes—Suspicion—Search Warrant—Manslaughter.

Under the provisions of our statute, 3 C. S., 3411(f), an officer of the law is required to have a search warrant or have personal knowledge of the fact committed in his presence, to make an arrest of those who are transporting spirituous liquor in violation of the statute, and for him to fire upon a passing automobile with only an erroneous suspicion that the occupants thereof were thus unlawfully engaged, is without warrant of law, and the unintentional killing of one of those suspected as a result, is manslaughter at least, and a verdict thereof under conflicting evidence will be sustained on appeal.

CLARKSON, J., concurring in the result.

APPEAL by defendants from *Webb, J.,* at April Term, 1926, of SURRY. No error.

Indictment for murder. From judgment upon the verdict that defendants are guilty of manslaughter, both defendants appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Carter & Carter and Folger & Folger for defendants.

CONNOR, J. Each of the defendants fired his pistol, several times, at an automobile in which deceased and two other boys were riding, after the automobile has passed defendants, on a public road in Surry County. A bullet fired by defendant, R. F. Simmons, entered the head of deceased, behind his ear, and inflicted the fatal wound. Both defendants had fired at the automobile with their pistols as it approached

them, and both continued to fire at it after it had passed them. Each defendant fired with the same motive, both with a common purpose, to wit, to stop the three boys who were in the automobile, in order that they might search it and ascertain whether or not they were transporting intoxicating liquor in violation of the laws of this State, and if so, to arrest them.

Both defendants were at the time deputy sheriffs of Surry County. In consequence of information which they had received, they had stood by the roadside, awaiting the approach of the automobile. They suspected that its occupants had gone across the State line into Virginia for intoxicating liquor, and were returning to Mount Airy, or its vicinity, with intoxicating liquor in the automobile. Neither of defendants had a warrant for the arrest of deceased or of his companions, or for the search of the automobile. Neither of the defendants had any personal knowledge that either of the boys was violating the law, or that there was any intoxicating liquor in the automobile, when they began firing their pistols for the purpose of causing the driver to stop. Defendants knew that the boys in the automobile had reputations for dealing in liquor, and suspected that they were then transporting liquor in the automobile.

They knew two of the boys, Johnny and Melvin Joyce, personally, and knew where they lived in Surry County. They had been informed that deceased, Jim Sutphen, had gone with the other boys on their trip to get intoxicating liquor. Each of these boys was about twenty years of age—two of them married. Deceased lived with his uncle, who operated a sawmill and gristmill, about three miles from Mount Airy, on Route No. 80 of the State highway system. All of them could easily have been apprehended at their homes in Surry County if they were violating the law.

Both Johnnie and Melvin Joyce testified that there was no liquor in the automobile when defendants undertook to stop them by firing their pistols. There was evidence that their general character for truth and honesty were good, but that they were "rough boys," and were suspected of handling liquor. There was no evidence at the trial that either of the boys was violating the law in any respect or that there was intoxicating liquor in the automobile when defendants attempted to search the automobile and to arrest the occupants.

Defendants testified that they stepped from the side of the road, where they had been standing, in front of the automobile, and called to the driver to stop; that the driver did not stop, but increased his speed; that they both then fired at the automobile; that the driver attempted to drive over defendant Simmons, and that after the automobile had passed them, each fired several times for the purpose of shooting the

tires, and thus causing the driver to stop. Johnnie Joyce, who was driving the automobile, testified that neither of defendants called to him to stop before they both fired. His brother, Melvin Joyce, corroborated him. There was evidence that both defendants are men of good character.

There was no exception to the admission or exclusion of testimony as evidence which we deem it necessary to discuss. There is no conflict in the evidence upon essential matters. The evidence is plenary that a bullet fired by defendant Simmons, while engaged in an unlawful act, caused the death of deceased, and that defendant Smith was present not only aiding and abetting defendant Simmons, but actively participating in the unlawful act. The evidence fails to show any facts which justify or excuse defendants. The defense urged in behalf of defendants, either that the pistols were fired by them in self-defense, or that defendants were justified in shooting because they were officers undertaking to make a lawful arrest or a lawful search of the automobile cannot be sustained by the evidence. We find no error in the full and careful charge of his Honor to the jury. Assignments of error based upon exceptions duly taken thereto, are not supported by the law.

Section 6 of ch. 1, Public Laws 1923, known as The Turlington Act, 3 C. S., 3411(f), contains the following words:

"Nothing in this section shall be construed to authorize any person to search any automobile or other vehicle or baggage of any person without a search warrant duly issued, except where the officer sees or has absolute personal knowledge that there is intoxicating liquor in such vehicle or baggage." See *S. v. Godette,* 188 N. C., 497. In the absence of a search warrant, or of absolute personal knowledge that there is intoxicating liquor in the automobile, defendant's attempt to search it was without authority of law. Defendants had neither a search warrant nor absolute personal knowledge, required by the statute for a lawful search of the automobile for intoxicating liquor.

In *S. v. Sigman,* 106 N. C., 728, in the opinion written by *Avery, J.,* the law is stated to be as follows: "An officer who kills a person charged with a misdemeanor while fleeing from him is guilty of manslaughter at least. 1 Wharton Crim. Law, sec. 5 (9 ed.); 2 Bishop Crim. Law (7 ed.), sec. 649. After an accused person has been arrested, an officer is justified in using the amount of force necessary to detain him in custody, and he may kill his prisoner to prevent his escape, provided it becomes necessary, whether he be charged with a felony or misdemeanor. But where a prisoner charged with a misdemeanor has already escaped, the officer cannot lawfully use any means to recapture him that he would not have been justified in employing in making the first arrest; and if in the pursuit he intentionally killed the accused,

it is murder; and if it appear that death was not intended, the offense will be manslaughter." See *S. v. Dunning,* 177 N. C., 559. The law will protect an officer who is attempting to make a lawful arrest or to make a lawful search, from consequences of his acts done necessarily in the performance of his duty. This principle cannot be invoked, however, in defense of an officer who in attempting to make an unlawful arrest or an unlawful search, commits an assault, with or without a deadly weapon. For the consequences of his unlawful acts, he must be held responsible to the same extent and with the same result as others who do not profess to act under the law. Defendants in this case were without authority to arrest deceased or either of his companions in the automobile. They had no warrant authorizing the arrest; no crime had been committed in their presence. They were acting solely upon suspicion, which however well founded they thought it to be, appeared at the trial groundless. The law is no respecter of persons—it holds those who profess to act in its name amenable to its requirements; it seeks to protect even those who may have previously violated its provisions when their rights are put in jeopardy by accusation of crime. It exacts of all men obedience to its mandates, and assures all men—even those suspected of crime—of its protection. No man ought to be deprived of life, liberty or property, except in accordance with its provisions. The judgment is affirmed. There is

No error.

CLARKSON, J., concurring in the result: The peace, quiet and good order of our State depends upon the individual citizen obeying the law of the land as made by the law-governing body. When we lay down at night, walk the streets of a city or town, travel the public highway, or elsewhere, it is the strong arm of the law that is around about us and protects us. Obedience to law is the duty incumbent upon all good citizens. The citizen who is unwilling to obey the law, the governing power has entrusted the enforcement to certain officers to arrest with warrant and, under certain circumstances, without warrant. It goes without saying that the primary duty is upon officers of the law to obey the law. As a rule, these enforcement officers are dealing with a lawless element, dangerous, who have set themselves in defiance to the will of the majority as expressed in our form of government. This element is not lamb-like and no officer is expected to meet a lamb like he would a lion. We cannot judge the enforcement officers as a whole by the misconduct of over-zealous officers exceeding their authority.

In *S. v. Smith,* 127 Iowa, p. 534, *Deemer, J.,* says: "An officer, in the performance of his duty as such, stands on an entirely different footing from an individual. He is a minister of justice, and entitled to

the peculiar protection of the law. Without submission to his authority there is no security, and anarchy reigns supreme. He must, of necessity, be the aggressor, and the law affords him special protection. In his capacity as an individual he may take advantage of the 'first law of nature,' and defend himself against assault; as an officer he has an affirmative duty to perform, and in the performance thereof he should, so long as he keeps within due bounds, be protected. Sentimentalism should not go so far as to obstruct the due administration of law, and brute force should not be permitted to obstruct the wheels of justice."

Pearson, J., in *S. v. Garrett,* 60 N. C., at p. 150, said: "In other words, resistance to the execution of the command of the State, is not allowed. The warrant must be executed *peaceably, if you can, forcibly if you must.*"

In *S. v. Pugh,* 101 N. C., at p. 739, it is said: "It was the duty of the defendant to interfere and suppress the fight, and if need be, he might, in good faith, strike a reasonable blow for the purpose. While he had no authority to strike an unnecessary blow, or one greatly in excess of what was necessary for the purpose, and wanton, he was the judge of the force to be applied under the circumstances, and he would not be guilty of an assault and battery unless he arbitrarily and grossly abused the power confided to him, and whether he did or did not was an inquiry to be submitted to the jury, under proper instructions from the court. A grossly unnecessary, excessive and wanton exercise of force would be evidence—strong evidence—of a wilful and malicious purpose, *but the jury ought not to weigh the conduct of the officer as against him in 'gold scales'* (italics mine); the presumption is he acted in good faith. This is the rule applicable in such cases as the present one, as settled in *S. v. Stalcup,* 2 Ired., 50; *S. v. McNinch,* 90 N. C., 696, and the cases there cited. So, also, *S. v. Bland,* 97 N. C., 438."

The good faith of the officers on the occasion and what they did is thus stated succinctly by them: On the evening of 21 November, 1925, a reliable person and a neighbor of Melvin Joyce and John Joyce and Jim Sutphen, came to the office of C. H. Haynes, sheriff of Surry County, and in the presence of the defendant, R. F. Simmons, stated that Melvin Joyce and John Joyce had gone to Virginia for a load of whiskey; that the money had already been raised and that they would pass along the Patrick courthouse road at or near the Sparger home that evening. He further stated to the sheriff, in the presence of Simmons that these parties would be traveling in a Ford roadster, and that a V-shaped hole had been made in the windshield; that the sheriff after receiving this report, requested R. F. Simmons, who was a deputy sheriff, to go and seize the car and the whiskey. R. F. Simmons reported these facts to E. S. Smith, another deputy sheriff, and the two

went to the place designated; that in addition to this information so received R. F. Simmons on a former occasion had found Melvin Joyce with a quart of liquor; that Joyce had undertaken to conceal the liquor; that in addition to this, both of the defendants knew of the general reputation of the said Joyce boys for being blockaders. With this information the two defendants stationed themselves at the point designated; that just before sundown on that evening the defendants about one hundred yards away recognized the car that had been described to them, coming up the road, and on closer inspection recognized the two Joyce boys with Sutphen in the car. The two defendants were standing several yards apart. The defendant, Smith, ran out into the road and waived his hand and ordered the car to stop; the car did not stop, but accelerated the speed. Simmons, whom the occupants admitted they knew to be an officer, ran out in the road in front of the car and waved and ordered them to stop; the car was not stopped. Both of the defendants shot in front of the car trying to stop it, after the order had been given to stop and had been refused. When Simmons ordered them to stop they deflected their car from the part of the road in which they were then traveling towards Simmons, and Simmons was required to jump out of the way to prevent the car from running over him, and in the attempt to escape, accidentally, without his knowledge, the pistol that he had in his hand fired. The car did not then stop, but continued with accelerated speed and never did stop; that the defendants did not have any knowledge that either one of these had been shot until after they came home; that upon subsequent examination of the car, and on the night of the homicide there was a distinct odor of liquor, and there was broken glass under the seat in the car and the arrangement under the seat of the car was of such a character as to show that it had been prepared for the transportation of liquor.

Where an arrest can be made without warrant is stated in *S. v. Godette,* 188 N. C., at p. 503, as follows: "The language of the Conformity (or Turlington) Act of this State, *supra,* is plain: that when an officer of the law shall discover any person transporting or possessing liquor in violation of law, that is when he sees or has absolute personal knowledge, the liquor and vehicle shall be seized and the person in charge arrested. The officer can arrest (1) when he sees the liquor; (2) when he has absolute personal knowledge. The latter is defined in the law. In 9 Gray Mass., 271, 'Knowledge, being a firm belief.' In *West v. Home Ins. Co.* (C. C.), 18 Fed., 6, it was held: 'Personal knowledge—knowledge of the truth in regard to a particular fact or allegation, which is original, and does not depend on information or hearsay.' This absolute personal knowledge can be acquired through the sense of seeing, hearing, *smelling,* tasting or touching. In Blackmore on Prohi-

bition (1923), p. 332, it is said: 'Under the Federal as well as the State statutes, to justify search and seizure or arrest without warrant the officer must have direct personal knowledge, through his hearing, sight or other sense of the commission of the crime by the accused. But it is not necessary that he should actually see the contraband liquor. . . . (*supra*, p. 334). If an officer sees intoxicating liquor being loaded on an automobile he can thereupon seize the vehicle and arrest the person who has put liquor on it, and other palpable conditions might authorize similar action, as plainly seeing the liquor leaking from a vehicle in which it is being transported, such a leak extending itself upon the public highway and the spirits spreading themselves and their odor along the road," etc.

Transportation of liquor or having liquor in one's possession for the purpose of sale is in North Carolina a misdemeanor. It is held in *S. v. Sigman*, 106 N. C., 728, that "Where a person charged only with a misdemeanor flees from the officer to avoid arrest, the latter is not authorized to take life or shed blood in order to make the arrest. Under such circumstances, if he kills, he will be at least guilty of manslaughter, and he will be guilty of an assault if no actual injury is inflicted if he uses such force as would have amounted to manslaughter had death ensued."

The United States Act in reference to arrest without warrant, says: "An Act Supplemental to the National Prohibition Act," approved 23 November, 1921, chapter 134, 42 Stat. at L., 222, 223, Comp. Stat., sec. 10, 184a, Fed. Stat. Anno. Supp., 1921, p. 230, provides: "That any officer, agent or employee of the United States engaged in the enforcement of this act, or the National Prohibition Act, or any other law of the United States, who shall search any private dwelling as defined in the National Prohibition Act, and occupied as such dwelling, without a warrant directing such search, or *who, while so engaged shall, without a search warrant maliciously and without reasonable cause search any other building or property,* shall be guilty of a misdemeanor, and upon conviction thereof shall be fined for a first offense not more than $1,000, and for a subsequent offense not more than $1,000 or imprisonment not more than one year, or both such fine and imprisonment."

Chief Justice Taft, in *Carroll v. U. S.*, 267 U. S., 131 (1924), construing the above statute in regard to arrest without warrant, under the Federal Statute, at p. 160, says: "We know in this way that Grand Rapids is about 152 miles from Detroit, and that Detroit and its neighborhood along the Detroit River, which is the international boundary, is one of the most active centers for introducing illegally into this country spirituous liquors for distribution into the interior. It is

obvious from the evidence that the prohibition agents were engaged in a regular patrol along the important highways from Detroit to Grand Rapids, to stop and seize liquor carried in automobiles. They knew, or had convincing evidence to make them believe, that the Carroll boys, as they called them, were so-called 'bootleggers' in Grand Rapids, i. e., that they were engaged in plying that unlawful trade of selling such liquor in that city. The officers had soon after noted their going from Grand Rapids halfway to Detroit, and attempted to follow them to that city to see where they went, but they escaped observation. Two months later these officers suddenly met the same men on their way westward, presumably from Detroit. The partners in the original combination to sell liquor in Grand Rapids were together in the same automobile they had been in the night when they tried to furnish the whiskey to the officers, which was thus identified as part of the firm equipment. They were coming from the direction of the great source of supply for their stock to Grand Rapids, where they plied their trade. That the officers, when they saw the defendants, believed that they were carrying liquor, we can have no doubt; and we think it is equally clear that they had reasonable cause for thinking so. Emphasis is put by defendants' counsel on the statement made by one of the officers that they were not looking for defendants at the particular time when they appeared. We do not perceive that it has any weight. As soon as they did appear, the officers were entitled to use their reasoning faculties upon all the facts of which they had previous knowledge in respect to the defendants," citing authorities. . . . "In the light of these authorities, and what is shown by this record, it is clear the officers here had justification for the search and seizure. This is to say, that the facts and circumstances within their knowledge, and of which they had reasonably trustworthy information, were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched."

The act quoted uses the words "maliciously and without reasonable cause"—different from the Turlington Act construed in *Godette's case, supra.*

Hoke, J., in *S. v. Dunning*, 177 N. C., at p. 562, well states the rights of officers, sustained by a wealth of authorities: "It is a principle very generally accepted that an officer, having the right to arrest an offender, may use such force as is necessary to effect his purpose, and to a great extent he is made the judge of the degree of force that may be properly exerted. Called on to deal with violators of the law, and not infrequently to act in the presence of conditions importing serious menace, his conduct in such circumstances is not to be harshly judged, and if

his is withstood, his authority and purpose being made known, he may use the force necessary to overcome resistance and to the extent of taking life if that is required for the proper and efficient performance of his duty. It is when excessive force has been used maliciously or to such a degree as amounts to a wanton abuse of authority that criminal liability will be imputed. The same rule prevails when an officer has a prisoner under lawful arrest and the latter makes forcible effort to free himself; and, in this jurisdiction, the position holds whether the offense charged be a felony or a misdemeanor, the governing principle being based on the unwarranted resistance to lawful authority and not dependent, therefore, on the grade of the offense."

The facts at the time of the occurrence, as stated by the officers, were disputed by the State's witnesses. The court below, under proper instructions, left the matter to the jury. The defendants were convicted and on the record I can find no error, and therefore concur in the opinion that the judgment of the court below should be

Affirmed.

GUY A. MYERS v. A. B. C. KIRK, A. B. C. KIRK BUS LINE, ROYAL BLUE TRANSPORTATION COMPANY, INC., L. F. BARNARD, AND PIEDMONT STAGE LINE, INC.

(Filed 8 December, 1926.)

1. **Carriers—Automobiles—Bus Lines—Combinations—Contracts—Negligence—Damages.**

Where there is sufficient legal evidence that several auto-bus lines operated between certain cities and towns, for the transportation of passengers for hire interchangeably, or the drivers for one line would take the passengers who had bought tickets over another of them as if sold over its own line, a ticket sold over one of these lines being equally acceptable by the other, either of the combined lines is responsible in damages for a personal injury negligently inflicted on a passenger.

2. **Negligence—Ownership—Evidence—Questions for Jury — Passengers —Damages.**

Evidence held sufficient for the jury in this case, that the defendants were mutually and interchangeably engaged under a contract or agreement to transport passengers between two cities, that the driver of the automobile whose negligence caused the injury wore a uniform bearing the appealing defendant's insignia, honored tickets bought for transportation over the other alleged combined lines, and the car was registered as that of such defendant in the department of revenue, the application for certificate so designated it, the appealing defendant received the car from the mechanic repaired it after the injury, and the president of the appealing defendant corporation acknowledged the ownership of the car by his corporation, etc.

3. Evidence—Questions for Jury—Issues.

Where the evidence is conflicting in an action to recover damages from a passenger auto-bus line for a personal injury alleged to have been negligently inflicted on the plaintiff while a passenger thereon, an issue is raised for the jury to determine.

4. Carriers—Evidence—Automobiles — Receipts — Appeal and Error — Harmless Error.

Where a passenger is negligently injured by the negligence of the defendant while riding on its car, and in his action to recover damages the question arises as to whether the defendant corporation was regularly engaged in transporting passengers for hire, the amount of money the defendant received for such services and the number of cars it thus had in use is competent evidence thereof, though not for the purpose of showing its commercial rating. *Held, further*, under the facts of this case the admission of such evidence would not constitute reversible error.

5. Evidence—Attorney and Client.

Representations of an attorney that he was acting for the defendant corporation in settling claims against it, made in the presence of defendant's president, and not denied by him, is sufficient evidence thereof to be submitted to the jury.

CIVIL ACTION, before *Harding, J.*, at March Term, 1926, of MECKLENBURG.

The plaintiff sued five defendants, to wit, A. B. C. Kirk, A. B. C. Kirk Bus Line, Royal Blue Transportation Co., Inc., L. F. Barnard and Piedmont Stage Line, for personal injury sustained by him on 6 January, 1925. Plaintiff alleged that the five defendants, at the time of his injury, and prior thereto, were engaged in the business of carrying passengers for hire from Charlotte to Greensboro by virtue of some private arrangement or mutual contractual relationship, and, as a result thereof, were acting together and sharing in the profits of transporting passengers between said points; that on 6 January, 1925, the plaintiff purchased a ticket in the city of Charlotte, marked "Kirk Bus Line," entitling him to one continuous passage on said date from Charlotte to Greensboro; that thereafter plaintiff became a passenger in a car operated by the defendants, and by reason of negligence and carelessness of the driver the said car was negligently operated and driven into a tree standing on the side of the highway, with such violence as to "practically tear down and uproot said tree," and as a result thereof plaintiff sustained five fractures of his left knee and knee cap, and other lacerations, cuts, wounds and bruises, resulting in serious permanent injury.

Each of the defendants filed answers denying liability. The defendant, Royal Blue Transportation Company, filed an answer denying liability. There was judgment against the defendants, A. B. C. Kirk,

trading as A. B. C. Kirk Bus Line, Royal Blue Transportation Co., and Piedmont Stage Line. The Royal Blue Transportation Co. appealed.

The evidence tended to show that the plaintiff bought a ticket from the Kirk Bus Line in the New Central Hotel at Charlotte, from E. H. Griffin, and boarded a bus at the corner of Eighth and Tryon streets in accordance with an arrangement made by Griffin. Griffin was stationed in the New Central Hotel at Charlotte and testified without objection: "I was in the employment of all of these bus lines for about fifteen months. During the time of my employment with the parties named I gave passengers information and directions and put them on the first bus that went out—it did not make any difference whose they were. I did not hold the passengers for any particular bus. The different bus lines named, exchanged and honored each other's tickets. The bus drivers would turn the tickets over to the bus owners. I know that L. F. Barnard and the Royal Blue Transportation Company were operating a car or cars on 6 January, 1925, from Charlotte to Greensboro." The witness further testified that the defendants, including Royal Blue Transportation Co., paid him for his services $2.60 per bus per month.

L. A. Love testified for the plaintiff: "That on 6 January, 1925, the Royal Blue Transportation Co. was operating cars or busses or conveyances between Charlotte and Greensboro, and that on said date said defendant operated a seven-passenger Studebaker car with a Rex enclosure, and that Griffin was serving the defendants by soliciting trade, calling busses and giving information in general."

Plaintiff testified that on the date of his injury he bought a ticket from Griffin, and at the time of purchasing the ticket, Griffin stated to him that it would be all right for him to go home and wait on the corner of Eighth and Tyron streets, and that he would send the Kirk Line Bus to that point. When the driver of the bus drove to that point he opened the door of the car—he was driving this seven-passenger Studebaker car—and he says to me, "Are you the man that the Kirk Bus Line Co. sent me to take to Greensboro?" I says, "I am." And he opened the door and says, "All right, get in." At that time I noticed he had on this uniform I just spoke of—that is the uniform of the Royal Blue Transportation Co.—and my ticket was on the Kirk Bus Line Co. And the driver said, "Kirk Bus Line Co. sent me after you—we work together; we handle each other's passengers. Get in." I got in . . . and presented my ticket, and he says, "I will take it up at the destination."

T. L. Kirkpatrick and H. L. Taylor for plaintiff.

Stewart, McRae & Bobbitt for defendant, Royal Blue Transportation Co.

BROGDEN, J. There was competent evidence of the negligent operation of the car, and also of serious and permanent injuries sustained by plaintiff. There was evidence to the effect that on 1 January, 1926, prior to the injury, the defendant, Royal Blue Transportation Co., had sold this car to the Piedmont Stage Line, Inc., and that on the date of the injury the car was owned and operated by the Piedmont Stage Line, Inc., and not by the defendant, Royal Blue Transportation Co. The whole case resolves itself, therefore, into the question as to whether or not there was any evidence that the Royal Blue Transportation Co. owned and was operating the car at the time of plaintiff's injury.

The record discloses the following indicia of ownership and operation of said car:

1. The driver of the car causing plaintiff's injury wore a uniform bearing the insignia "Royal Blue Transportation Co."

2. The defendants honored each other's tickets and placed passengers on the first bus leaving Charlotte, regardless of the ticket held.

3. The car in which the plaintiff was riding was registered in the Department of Revenue and was operating under a license issued to the defendant, Royal Blue Transportation Co., said license having been issued on 30 June, 1924.

4. The application for the registration of said car for title certificate designated the Royal Blue Transportation Co. as the owner of said car.

5. The mechanic in Salisbury, who pulled the wrecked car in and repaired it, testified, without objection, that he repaired the car and sent the bill to the Royal Blue Transportation Co., and, further, that "Royal Blue Transportation Company responded to that notice by coming after the car."

6. L. F. Barnard, president of the Royal Blue Transportation Co., told Mr. Ervin, an attorney of Charlotte that the car causing the injury was the property of the Royal Blue Transportation Co. at the time of the wreck. There was no objection to the testimony of this witness. There was other testimony to the same effect.

We are of the opinion that these facts and circumstances constituted sufficient evidence of ownership and operation of said car by the defendant, Royal Blue Transportation Co., to be submitted to the jury. *Freeman v. Dalton,* 183 N. C., 538; *Hensley v. Helvenston,* 189 N. C., 636.

The evidence, it is true, was conflicting upon this phase of the case, but conflicting testimony affects only the credibility of the witness or witnesses, and does not warrant the withdrawal of the case from the jury. *Shell v. Roseman,* 155 N. C., 90; *Christman v. Hilliard,* 167 N. C., 5; *Shaw v. Handle Co.,* 188 N. C., 236; *In re Fuller,* 189 N. C., 512; *Smith v. Coach Line,* 191 N. C., 589.

The defendant excepts to evidence as to the amount of money collected by the defendant, Royal Blue Transportation Co., and also as to the number of cars in use. This evidence was competent to show that the defendant was operating as a carrier of passengers on the date of plaintiff's injury. If the evidence had been elicited for the purpose of showing the commercial rating of defendant, it would have been irrelevant; but, even so, it would not constitute reversible error under the facts and circumstances presented in this record. *Lumber Co. v. Lumber Co.,* 176 N. C., 504.

Exceptions 70 and 71 relate to the testimony of witness Ervin, who testified that L. B. Vreeland was attorney for the Royal Blue Transportation Co. The witness said: "The only way I can answer that question is by stating what Mr. Vreeland did as attorney for the party to this action. Mr. Vreeland, as attorney for the Royal Blue Transportation Co., representing himself as attorney for the Royal Blue Transportation Co., signed an agreement that all notices that he had given or might be given as to taking of the deposition had been waived by the Royal Blue Transportation Co." The witness was an attorney and was negotiating in the interest of O'Henry Moore, who was a passenger in the car with the plaintiff, and was also injured in the wreck. Barnard, president of the defendant, was present at the conversation.

There were facts and circumstances which the jury might well have found reasonably induced a careful and prudent person to suppose that the attorney was authorized to act for his client in the matter. *Bank v. Hay,* 143 N. C., 326; *Trollinger v. Fleer,* 157 N. C., 81.

The case in its final analysis presents only issues of fact, and these issues, under a proper charge, have been resolved against the defendant, and the judgment is upheld.

No error.

STATE v. GEORGE THOMPSON.

(Filed 8 December, 1926.)

1. Criminal Law—Evidence—Barn Burning—Bloodhounds—Tracks.

Where the reliability of bloodhounds has been testified to in following human beings by the scent, by one who has had experience with them: *Held,* on the trial of defendant for burning a barn, C. S., 4242, the tracing by the bloodhounds some two hours later of a track leading from the rear of the barn to defendant's residence, together with the identification of the track as that of defendant by one of his shoes, with evidence of motive, is sufficient evidence of guilt to take the case to the jury.

2. Evidence—Questions and Answers — Appeal and Error — Harmless Error.

An inaccurate question asked a witness will not disturb the verdict finding the defendant guilty of a criminal offense, when it is cured by the answer of the witness thereto.

APPEAL by defendant from *Bryson, J.*, at April Term, 1926, of RANDOLPH.

The defendant was indicted for burning a barn in the possession of J. W. Kinley in breach of C. S., 4242, and from the judgment pronounced upon a verdict of guilty he appealed, assigning error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Moser & Burns for defendant.

ADAMS, J. The defendant's principal exception relates to a denial of his motion to dismiss the action as in case of nonsuit. C. S., 4643. The motion in effect is a demurrer to the evidence and presents the question whether the testimony of the witnesses and the inferences reasonably to be drawn therefrom are sufficient in law to sustain the verdict and the judgment.

Considered most favorably for the State the testimony tends to prove the circumstances following. The barn was burned about ten o'clock on Sunday night, 19 July, 1925, the fire having started in an overhead driveway. A little after midnight bloodhounds were brought from Asheboro by W. C. York, who testified: "I am a traveling salesman. I own, keep and possess bloodhounds. I have still and did have at that time these animals in my possession. I did not own them on 19 July, 1925, but I worked them. I have had them about five or six years. The dogs are English, the female is English and American mixed. I have used them four or five years and the records show they have been used longer. The dogs are trained dogs for the purpose of tracking human beings. They are reliable in that particular."

He carried the dogs behind the barn where no person had been since the discovery of the fire; there "they struck a track and opened up." A short distance from the barn one of the witnesses saw a track by the light of a lantern and followed it to a pathway in the woods, then into a road that leads to Hunt's, and afterwards into another leading to the defendant's house. The tracks found in the path and in the roads pointing to and from the barn were the same as the track from which the dogs began the trail. From the barn the dogs went across some plowed ground into the woods, across a branch, into some roads, and then on to the defendant's porch. There they stopped. Questioned

in reference to his shoes the defendant said that he had a pair of brogans and afterwards admitted that he owned another pair, one of which he produced. This shoe was a 7 or 7½, with a narrow toe and a rubber heel, and at the barn and several other places was fitted into the tracks just referred to. The rubber heel was worn and corresponded with the worn appearance of the heel in the tracks. The sheriff testified that about thirty yards back of the barn there was a plain, fresh track that the left shoe fitted.

Though the prosecuting witness had refused to sign a bond for the release of the defendant's son, who was then in custody, and though on the Friday next preceding the night of the fire the defendant told Dora Hughes that people were going to be sorry for treating him as they had treated him, the evidence of motive is slight; but on the following Tuesday the defendant suggested to Jesse Harrelson and his wife that "he would come clear" if they would testify that they left his house at a certain time.

If the testimony in regard to the action of the dogs be laid aside there is still more than the proverbial "scintilla" of evidence to be considered on behalf of the State; and when this evidence is corroborated by the trailing of the dogs two hours after the fire occurred its probative force is such as to justify its submission to the jury.

The exceptions to the evidence are overruled. If the question to which the first relates was inaccurately phrased the error is cured by the answer; and as to the second, York's statement that he had to find the track back of the barn was intended to indicate the place where it was presumed the tracks would probably be found.

We find

No error.

HALL v. RINEHART & DENNIS COMPANY, INC.

(Filed 8 December, 1926.)

Negligence—Torts—Proximate Cause.

Where the defendant in the exercise of ordinary care, should reasonably have anticipated that its negligent act would proximately cause an injury, it is not required to make it liable for the consequences of the act, that the particular injury in suit should have been anticipated, if it was the proximate cause and naturally resulted therefrom in continuous sequence.

CIVIL ACTION, before *Schenck, J.*, at August Term, 1926, of GASTON.

The plaintiff was seriously and permanently injured while in the employment of the defendant, resulting from a blow on the head by a

rock thrown from blasting operations in the Catawba River. The plaintiff was seated in a mess hall operated by the defendant, eating supper. The defendant set off a heavy blast in the river bed from four to six hundred feet from the mess hall, and a rock from said blast fell upon the roof of the mess hall, crashing through and striking plaintiff on the head, and inflicting the injuries complained of.

There was judgment for the plaintiff, and the defendant appealed.

This case was considered by the Court in a former appeal reported in 191 N. C., p. 685.

A. E. Woltz, George W. Wilson, Bramhall & McCabe, C. A. Thompson, John M. Robinson for plaintiff.

Clyde R. Hoey, Mason & Mason, T. C. Guthrie for defendant.

PER CURIAM. Plaintiff's chief assignment of error urged in the oral argument and discussed in the brief, is to the following charge of the trial judge: "The court charges you as a matter of law that in order that a party may be liable for negligence, it is not necessary that he could have contemplated, or even been able to anticipate the particular consequences which ensued, or the precise injuries sustained by the plaintiff. It is sufficient if by the exercise of reasonable care the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected."

This part of the charge is taken from *Drum v. Miller,* 135 N. C., 215.

The defendant contends that the correct rule should be whether or not a reasonably prudent man in a similar situation to that of the defendant, could, under all the facts and circumstances, reasonably have foreseen that some person who was in a similar or analogous situation to that of plaintiff at the time of setting off the blast, would probably be injured thereby; or, in other words, that a reasonably prudent man, under the circumstances, could have foreseen the particular injury complained of. But the rule as stated in *Drum v. Miller* has been approved many times by this Court, as will appear by an examination of Shepard's Annotations.

In *Hudson v. R. R.,* 142 N. C., 203, *Justice Hoke* says: "The doctrine is that consequences which follow in unbroken sequence without an intervening efficient cause from the original wrong are natural, and for such consequences the original wrongdoer must be held responsible, even though he could not have foreseen the particular result, provided that in the exercise of ordinary care he might have foreseen that some injury would likely follow from his negligence." (Citing *Drum v. Miller, supra.*)

In *Hudson v. R. R.*, 176 N. C., 492, *Allen, J.*, says: "In support of the first two positions the defendant relies on the definition of proximate cause, in *Ramsbottom v. R. R.*, 138 N. C., 41, approved in *Bowers v. R. R.*, 144 N. C., 686, and in *Chancey v. R. R.*, 174 N. C., 351, as "A cause that produces the result in continuous sequence, and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed," to which we adhere, with the modification contained in *Drum v. Miller*, 135 N. C., 204, and many other cases, that it is not required that the particular injury should be foreseen, and is sufficient if it could be reasonably anticipated that injury or harm might follow the wrongful act."

An examination of the cases in which *Drum v. Miller* has been cited and approved, will disclose that the principle has never been questioned nor modified, and is therefore the law of the State.

There are other exceptions in the record, but they present no reversible error, and the judgment is affirmed.

No error.

STATE v. MANESS.

(Filed 8 December, 1926.)

Criminal Law—Seduction—Statutes—Evidence—Unsupported Testimony of Prosecutrix.

In order to convict of the felony prescribed by C. S., 4339, the testimony of the prosecutrix must be supported by other legal evidence of facts and circumstances as to the carnal knowledge, etc.

APPEAL from *Finley, J.*, and a jury, at August Term, 1926, of MOORE. New trial.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

H. F. Seawell and Herbert Seawell, Jr., for defendant.

PER CURIAM. Defendant was indicted under C. S., 4339, which is as follows: "If any man shall seduce an innocent and virtuous woman under promise of marriage, he shall be guilty of a felony, and upon conviction shall be fined or imprisoned at the discretion of the court, and may be imprisoned in the State prison not exceeding the term of five years: *Provided*, the unsupported testimony of the woman shall not be sufficient to convict: *Provided further*, that marriage between the parties

shall be a bar to further prosecution hereunder. But when such marriage is relied upon by the defendant, it shall operate as to the costs of the case as a plea of *nolo contendere,* and the defendant shall be required to pay all the costs of the action or be liable to imprisonment for nonpayment of the same."

There were three elements to this crime: (1) The carnal intercourse; (2) with an innocent and virtuous woman; (3) induced by promise of marriage.

"The statute, however, has this proviso: *'Provided,* the unsupported testimony of the woman shall not be sufficient to convict.' There are three essentials to the conviction. All the elements must be proved by supporting testimony." *S. v. Doss,* 188 N. C., p. 214; *S. v. Crook,* 189 N. C., p. 545.

In *S. v. Ferguson,* 107 N. C., at p. 850-1, it is held: "The crime does not consist in the sexual intercourse, nor in the seduction, nor in the innocence and virtue of the woman, but in committing the act under promise of marriage, without which no crime is created by the statute, and which alone makes the seduction criminal, and in this it is not sufficient that the prosecutrix shall be corroborated, but she must be supported by independent facts or circumstances."

Under the facts in the present case, we do not think the prosecutrix supported by independent facts or circumstances, as to the carnal intercourse. The record shows the defendant is 27 years old and the prosecutrix is 40 years old. No child was born of the intercourse. There is no evidence in the record in which her testimony is supported by independent facts or circumstances, as is required by the statute. There must be a

New trial.

J. J. WELCH v. GEORGE T. MURDOCK.

(Filed 8 December, 1926.)

Deeds and Conveyances—Restraint on Alienation—Fee-Simple Title.

The condition expressed in a deed to lands that they "cannot be conveyed until the third generation," is a restraint on alienation and inoperative, and the grantee acquires the fee.

APPEAL by defendant from *McElroy, J.,* at Fall Term, 1926, of RANDOLPH. Affirmed.

H. M. Robins for plaintiff.
Moser & Burns for defendant.

PER CURIAM. Della Welch made a will which soon after her death was duly admitted to probate, and in the second item thereof set out the following devise: "I give and devise to my friend, J. J. Welch, a tract of land bounded as follows: On the south by Herman Pierce and others, on the east by Mary Welch and J. J. Welch's home place, on the north by Jenny Harvell and others, on the west by S. D. Hancock *et al.*, known as the J. D. Welch home tract, and cannot be conveyed until the third generation. Excepted 28 acres willed to Pink Strider on the southwest corner of said tract known as the Manuel Strider place."

Thereafter, on 15 August, 1926, the plaintiff, J. J. Welch and Caroline Welch, his wife, entered into a written contract with the defendant to execute and deliver to him on or before 25 August, 1926, a deed with full covenants conveying in fee the land above described. In accordance with his agreement the plaintiff made due tender of a deed executed by himself and his wife sufficient in form to convey the fee, but the defendant declined to accept the deed and refused to pay the purchase price on the ground that the phrase "And cannot be conveyed until the third generation" restrains or prevents a conveyance of the title in fee. The only interest the plaintiff's wife has in the land is her inchoate right of dower.

Upon the facts agreed his Honor held that the plaintiff with the joinder of his wife can convey a title in fee and that the defendant should comply with the contract, pay the purchase price, and accept the plaintiff's deed. The judgment is sustained by a number of our decisions. Absolute restraint on alienation by a tenant in fee is void even if the restraint be for a limited time. *Combs v. Paul,* 191 N. C., 789. Restrictions of this character are generally classed among repugnant conditions, neither of the two or three exceptions having any application to the facts of this case. *Wool v. Fleetwood,* 136 N. C., 461; *Latimer v. Waddell,* 119 N. C., 370; *Pritchard v. Bailey,* 113 N. C., 521; *Hardy v. Galloway,* 111 N. C., 519; *Twitty v. Camp,* 62 N. C., 61; *Dick v. Pitchford,* 21 N. C., 480. The judgment is

Affirmed.

LINDSEY CARROLL, ADMINISTRATOR OF CHARLIE CARROLL, DECEASED, v. CLINCHFIELD PRODUCTS CORPORATION, AND FRED ROBINSON.

(Filed 8 December, 1926.)

Removal of Causes—Federal Court—Diverse Citizenship—Misjoinder—Parties.

Where a nonresident defendant and its resident foremen are liable for the negligent death of plaintiff's intestate, the former in failing to furnish reasonably safe instrumentalities and the latter in directing the

continuance of the employment thereunder, the liability is joint and not severable, and defendant's motion to remove the case to the Federal Court for misjoinder of parties, under the Federal Statutes, will be denied.

APPEAL from *Shaw, J.*, at Fall Term, 1926, of YANCEY. Affirmed.

Charles Hutchins for plaintiff.
A. Hall Johnston for defendant.

PER CURIAM. This is an action for actionable negligence brought by plaintiff against the defendants, for damages in excess of $3,000.

The Clinchfield Products Corporation is a corporation under the laws of Virginia. Defendant, Clinchfield Products Corporation, within the time allowed by law, after due notice and giving the required bond, filed a petition for removal of the action from the State court to the United States Court for the Western District of North Carolina, on the ground of diversity of citizenship and fraudulent joinder.

The facts, as alleged by the plaintiff, were that his intestate, Charlie Carroll, was employed by the defendant, a mining corporation, to work in a feldspar mine in Mitchell County, and at said mine the defendant had made a large excavation into the mountain, 100 feet or more, and in which employees worked in removing feldspar from the mine. The feldspar was loosened by means of blasts and feldspar, mineral formation, after blasts are left off, the banks and walls of the mine become loose, so that it is dangerous for employees to work in the mine pit. On account of blasts in the mine pit, the plaintiff, who had been working in the mine pit, was, as required, standing on the bank of the mine, until the walls of the mine could be scaled, so as to make the mine pit safe for employees. For the purpose of removing the feldspar and waste from the mines, the defendant has provided powerful steam-driven machinery, and uses a derrick, operated by foot and friction brakes, whereby the large containers carrying feldspar from the mines may be let down into the mine, and then carried out by the raising of the derrick. The derrick pole is a large tree, with necessary supports, and steel wire attachments, and when the machinery is in proper order, the machinery operates smoothly, and the pole is lowered gradually, and there is no danger whatever to employees. If the machinery is not in proper order—if the brake, or drum is clogged, or in imperfect working condition from any cause, the pole is liable by reason of the failure of the brakes to work, to suddenly drop, and to injure employees. In scaling the walls of the mine, the defendant negligently enhanced the danger, by attaching to the derrick pole a pine tree, projecting much

farther than the pole itself, and adding great weight thereto, and increasing the required resisting power or holding power of the brakes. It is alleged in the complaint that the defendant and its foreman, Robinson, codefendant, were both negligent, in that the brakes were not kept in order, in that they were left clogged, and that it was the duty of the defendant to keep the brakes in proper order, which it failed to do, and which its foreman, and codefendant likewise failed to do, and that their acts were joint and concurrent, and that such joint and concurrent negligence proximately produced the injury complained of; that the foreman was actually present, and was the responsible person to whom the defendant had delegated the duty of running the machinery, and seeing to it that the same was kept in order. While this foreman was actually at his work, and directly in charge of the machinery aforesaid, through failure of the machinery to work properly, as it would have worked if kept in proper repair, the derrick pole gave way, and fell by reason of the failure of the joint *tort-feasors* to do and perform their duty in keeping the machinery in proper repair, and working condition, and plaintiff's intestate was killed.

We think the action is governed by the opinion of the Supreme Court of the United States, by *Mr. Justice Sanford*, decided 24 May, 1926, in case of *Hay v. May Dept. Stores Co. and McCormick;* see *Moses v. Town of Morganton, ante,* 102; *Swain v. Cooperage Co.,* 189 N. C., p. 528; *Timber Co. v. Ins. Co.,* 190 N. C., at p. 803.

We do not think that the showing in the petition of Clinchfield Products Corporation sustains the contention that it was fraudulently joined for the purpose of preventing removal and comes within the principle laid down in *Johnson v. Lumber Co.,* 189 N. C., p. 81, and cases therein cited.

From the allegations in the complaint, Clinchfield Products Corporation and Fred Robinson are jointly liable, joint *tort-feasors.* This liability arising from concurrent acts of negligence on the part of the defendants, coöperating to cause the death of plaintiff's intestate. The complaint alleges a controversy that is not separable.

From the facts alleged in the petition for removal, we cannot hold that the Clinchfield Products Corporation was fraudulently joined with Fred Robinson for the purpose of preventing the removal. The judgment below is

Affirmed.

DILLING COTTON MILLS v. LOWELL COTTON YARN COMPANY.

(Filed 8 December, 1926.)

Appeal and Error—Reference—Findings of Fact—Evidence—Review.

The findings of fact by a referee upon competent evidence affirmed in the Superior Court on appeal thereto, is not reviewable on the further appeal to the Supreme Court.

APPEAL by defendant from judgment of Superior Court of GASTON County, rendered 6 February, 1926, by *Harding, J.* Affirmed.

Action to recover balance due upon account for goods sold and delivered; in defense, defendant pleads as counterclaim damages for breach of contract alleged in the answer. Plaintiff in its reply denies the contract.

From judgment upon report of the referee that plaintiff recover of defendant the sum of $865.67, with interest and costs, defendant appealed to the Supreme Court.

O. Max Gardner, O. F. Mason, and George B. Mason for plaintiff.
Mangum & Denny for defendant.

PER CURIAM. The referee, to whom this action was referred for trial, found as a fact that "no enforceable contract was entered into by and between the plaintiff and defendant on or about 31 January, 1918, the basis of defendant's counterclaim." He therefore concluded as a matter of law that the defendant is not entitled to recover any damages of plaintiff as a counterclaim. To this finding of fact and conclusion of law defendant excepted. The judge overruled these exceptions, and defendant upon its appeal to this Court assigns same as error.

The referee's conclusion of law that defendant was not entitled to recover damages of plaintiff was manifestly correct, if there was no error in his finding of fact. There was evidence at the hearing before the referee sufficient to support his finding of fact, which was approved by the trial judge. Such finding is therefore not reviewable upon appeal to this Court. *Sanders v. Griffin,* 191 N. C., 453, and cases cited. "It is the accepted position with us that the findings of fact by a referee, concurred in by the judge, are conclusive when there is competent evidence to sustain them." *Comrs. v. Abee Bros.*, 175 N. C., 701. The assignment of error cannot be sustained. The judgment is

Affirmed.

THOMAS GREER ET AL. V. BOARD OF COMMISSIONERS OF WATAUGA COUNTY ET AL.

(Filed 15 December, 1926.)

1. Reference—Evidence—Findings of Fact—Appeal and Error—Review.

Upon the coming in of the report of the referee, it is required of the trial judge to pass upon the evidence and the findings of fact, with the power to change or modify the findings upon supporting evidence, and when this is done in conformity with the law, the findings so made are not reviewable on appeal in the Supreme Court.

2. Same—Presumptions.

Where the Superior Court judge reverses the conclusions of law of the referee and the record is silent as to any findings of fact made by him, it will be presumed that he approved of the findings of fact by the referee set out in the record.

3. Same—Conclusions of Law—Record.

Where the plaintiff seeks to recover damages for the taking of his land for the use of a public highway, without compensation, and the cause has been referred to a referee, who has found as a fact that the special advantages will equally offset the value of the land so taken, a conclusion of law of the judge thereon awarding plaintiff additional damages without change in the referee's findings of fact, is unsupported by the facts found and the cause will be remanded to be proceeded with in the due course and practice of the courts.

CIVIL ACTION, before *Lane, J.*, at September Term, 1926, of WATAUGA.

The plaintiff instituted an action against the board of county commissioners and the good road commission of Watauga County, alleging that the defendants "without any condemnation proceedings, and without the consent of plaintiff, and without any notice to plaintiff, entered upon" the lands of plaintiff and appropriated part of his land; and, further, that in the construction of the road certain personal property, to wit, rails and corn, was destroyed, and also certain fruit trees, and that the total damage suffered by him by reason of such unlawful taking was $3,500.

By consent of the parties, the matter was referred to J. H. Burke as referee, who was authorized to hear the entire controversy and to report to the court his findings of fact and conclusions of law. Thereupon the referee heard all of the evidence and argument of counsel and filed a report.

The referee found that the plaintiff had suffered damage in the sum of $1,065.00, but paragraph nine of his report is as follows: "That the plaintiff received special benefits from the construction of the highway, which was not common to other landowners along said highway,

in that the highway made accessible a very fine view, suitable for development, and by so doing greatly enhanced the value of the plaintiff's property, and the benefits to the plaintiff on this account, which is found not to be common to other property owners, in a sum equal to or greater than the sum of $1,065; and I find the benefits to the plaintiff to be $1,065, which is found to be a proper set-off as against the items found as damages to the plaintiff, and that after deducting the benefits as herein referred to, being special benefits, that the plaintiff has not sustained any damages.

"Conclusions of Law: That upon the foregoing findings of fact, I conclude that as a matter of law, the plaintiff is not entitled to recover any sum whatever, for the reason that the special benefits received fully cover any damage that he sustained otherwise.

J. H. BURKE, *Referee."*

The plaintiff duly filed exceptions to the referee's report as follows: "That the plaintiff excepts and objects to Item No. 9 of the referee's report, for the reason that the same is against the greater weight of the evidence, and for the further reason that there is no evidence in the record of any special benefits received by the plaintiff over and above the general benefit received by other landowners through whose land the highway was constructed."

The matter came on for hearing upon the report and exception thereto, and the following judgment was rendered: "This cause coming on to be heard before his Honor, Henry P. Lane, judge presiding, upon exceptions filed to the report of the referee in this cause, and being heard, it is considered and adjudged by the court that the exceptions filed by the plaintiff to the referee's report be, and the same are hereby overruled and reversed:

It is, therefore, upon motion of T. C. Bowie, attorney for plaintiff, considered and adjudged that the plaintiff recover of the defendant the sum of $1,065 and the costs of this action to be taxed by the clerk.

HENRY P. LANE, *Judge Presiding."*

From the judgment so rendered the defendant appealed.

T. C. Bowie for plaintiff.
Brown & Bingham and F. A. Linney for defendant.

BROGDEN, J. The trial judge sustained the exception to the referee's report, and rendered judgment for the plaintiff without finding any facts.

The referee found the facts, and also found as a conclusion of law upon such facts that the plaintiff was not entitled to recover for the

reason "that the plaintiff received special benefits from the construction of the highway which was not common to other landowners along said highway, in that the highway made accessible a very fine view, suitable for development, and by so doing greatly enhanced the value of plaintiff's property, and the benefits to the plaintiff on this account, which is found not to be common to other property owners, in a sum equal to or greater than the sum of $1,065, . . . and that after deducting the benefits as herein referred to, being special benefits, that the plaintiff has not sustained any damages."

"The Judge having made no specific findings of fact, he is presumed to have adopted those of the referee. . . . . But the finding of the referee was adverse, and we cannot review his findings of fact. The judge below possessed that power, but he approved the referee's findings." *McEwen v. Loucheim,* 115 N. C., 348. If the trial judge had found the facts on exceptions filed to the referee's report, such findings are not reviewable in the Supreme Court, if there is evidence to support them. *Miller v. Groome,* 109 N. C., 148; *Dumas v. Morrison,* 175 N. C., 431; *Caldwell v. Robinson,* 179 N. C., 518; *Hardy v. Thornton, ante,* 296.

The judge, upon exceptions duly filed to a referee's report, may set aside, modify or confirm the report of the referee, but if he does not find the facts, the facts found by the referee are presumed to have been adopted by the judge. So that, in this case, we have this situation: The referee has found, as a fact, that the construction of the highway made available to the plaintiff certain special benefits not common to other property in the neighborhood and similarly situated. By reason of the failure of the trial judge to find the facts in regard to the special benefits alleged, the finding by the referee stands.

Therefore, the judgment is not supported by the facts found.

In *Davis v. Davis,* 184 N. C., 108, the proper procedure, in such cases, is stated thus: "When exceptions are taken to a referee's findings of fact and law, it is the duty of the judge to consider the evidence and give his own opinion and conclusion, both upon the facts and the law. He is not permitted to do this in a perfunctory way, but he must deliberate and decide as in other cases—use his own faculties in ascertaining the truth, and from his own judgment as to fact and law. This is required not only as a check upon the referee and a safeguard against any possible error on his part, but because he cannot review the referee's findings in any other way."

Upon the present record, therefore, in accordance with established principles of law, the judgment is set aside and the cause remanded for further consideration of the report of the referee, in conformity to the course and practice of the Court.

Remanded.

FRANKLIN v. LINVILLE RIVER RAILWAY COMPANY.

(Filed 15 December, 1926.)

1. **Railroads—Crossings—Negligence—Motor Cars.**

In the running of motor cars upon its tracks a railroad company is required to observe the same care in approaching a frequented highway or road crossing as in the operation of its trains thereon.

2. **Same—Evidence—Contributory Negligence—Proximate Cause—Questions for Jury—Nonsuit.**

Where there is evidence that a pedestrian upon a public road saw defendant railroad company's motor car standing upon one of its tracks about fifty or seventy-five yards from the point the road crossed the railroad tracks, and at this point he was a few minutes thereafter injured by the motor car coming without signal or warning and without his knowledge of its approach until it was upon him, it is for the jury to determine the question as to whether the negligence of the defendant or that of the plaintiff was the proximate cause of the resulting injury, and to deny defendant's motion as of nonsuit thereon.

3. **Same—Warnings.**

Testimony of the plaintiff that he had not heard the required signals or warnings from a motor car of defendant railroad company as it approached on the defendant's track a frequented highway or road crossing, is legal evidence that such warnings were not given.

4. **Railroads—Crossings—Contributory Negligence.**

It is required of a person to make diligent use of his senses to discover whether there is danger in crossing a railroad track in constant use.

CIVIL ACTION before *Lane, J.*, at July Term, 1926, of AVERY.

The defendant operates a line of railway through the town of Montezuma, and also operates motor cars or lever cars on its said tracks through said town. In said town there was a public crossing across said line of railway extending from the east to the west side thereof, near the store known as the Loven Store. The citizens of said town and county had been accustomed to pass and repass over said crossing for the last thirty years. On or about 21 October, 1925, the defendant was operating on its tracks a motor or lever car.

The plaintiff testified as follows: I came out of the storehouse and walked on the cement walk and turned to go south to my place, and I looked and saw this lever car setting down at the depot, and I looked and its back was to me, and it was facing Newland, I mean the driver of the car. This was fifty or seventy-five yards, and about fifty yards from where I was at. It was about thirty yards from the store porch up to this crossing. After I stood and looked and saw it headed this way going to Newland I thought to myself it came from Linville

and had started to Newland, and I never looked for him any more until I walked that distance. I walked up to the crossing pretty fast. I was in a hurry to get home. I walked up to the edge of the crossing, came to the east end of it, stepped on the crossing and was going to walk upon the crossing toward the upper end. I heard a noise of something running and turned my head to the right, and this lever car was in about eight or ten feet of me as near as I could tell. It was going right backwards on to me. The driver of the car was sitting with his back to me and his face down over here and was reaching down like he was reaching for something in front of the car and not looking at me when I looked at him. . . . I made a jump to the left . . . and as I jumped I got my body and leg over the crossing rails, but I did not get my left thigh from the end of the lever. The end of the lever struck my thigh, and I struck my arm bone on end of the car that was sticking out of the side. . . . I could not tell the rate of the speed the car was coming. It looked to me like it was coming as fast as it could run. It was making full speed, was running at the rate of ten or fifteen, maybe twenty miles. . . . I never heard any signal until I heard the noise and turned my head to the right and saw it coming on the track. . . . I walked by the side of the railroad track about ten or fifteen yards from the end of the cement up to the track crossing. . . . When I started to walk on the track I looked down the road. I did not look back down to the depot for I had no thought but what he was coming this way if I had looked back that way. I do not know whether I could have seen this car or not—I haven't eyes behind me. . . . Q. You walked down the railroad and then stepped over on the railroad track without looking back to the depot? A. I had already looked. I don't know that I looked right there but I looked when I started back down there. I told you I looked when I started out there. . . . When I was stepping on the track if I had looked down the road I might have seen it. I don't know that I would have seen him. . . . The car was something like forty or fifty yards from the store when I looked. After I looked at the car I walked twenty-five or thirty yards. . . . When I saw the car at the depot it was standing still. . . . The driver of a lever car faces the way he is going. He was sitting with his face toward Newland and his back to me."

At the conclusion of plaintiff's evidence, the trial judge entered judgment of nonsuit, and the plaintiff appealed.

Harrison Baird, W. C. Newland, S. J. Ervin and S. J. Ervin, Jr., for plaintiff.

T. A. Love, James H. Epps and F. A. Linney for defendant.

BROGDEN, J. The evidence for plaintiff, viewed in its most favorable light, tends to show that plaintiff came out of a store near the track of the defendant. He looked and saw to the north a lever car or motor car of the defendant, apparently facing north, and standing still. The plaintiff then walked south about twenty-five or thirty yards to a public crossing, and at that place, attempted to cross the track when he suddenly heard a noise of something running. He turned his head and the motor car of defendant was being backed over said crossing, the motorman facing north and backing south, and bending down, apparently looking at some part of the machinery. The plaintiff was struck and injured.

The same rule of liability applies to a railroad motor car in backing over a crossing with respect to notice as to engine or box-car, for the reason that "both can wound and kill." *Hill v. R. R.*, 166 N. C., 592. The crossing at which plaintiff was injured was a grade crossing and had been used as a public crossing for many years. "It is the duty of an engineer in charge of a moving train to give some signal of its approach to the crossing of a public highway over a railway track, or to a crossing which the public have been habitually permitted to use, and where he fails to do so, the railroad company is deemed negligent and answerable for any injury due to such omission of duty." *Russell v. R. R.*, 118 N. C., 1108; *Bradley v. R. R.*, 126 N. C., 738; *Farris v. R. R.*, 151 N. C., 487; *Bagwell v. R. R.*, 167 N. C., 611; *Goff v. R. R.*, 179 N. C., 216; *Perry v. R. R.*, 180 N. C., 290; *Earwood v. R. R., ante*, 27.

The plaintiff testified that he heard no signal prior to or at the time he stepped upon the crossing. This is some evidence that no signal was given. *Goff v. R. R.*, 179 N. C., 216; *Perry v. R. R.*, 180 N. C., 290; *Earwood v. R. R., supra.* The law makes it the duty of the person using a crossing of a railroad track to make diligent use of his senses in order to discover whether there is danger of injury or collision. However, as stated by *Allen, J.*, in *Horne v. R. R.*, 170 N. C., 650: "In other words, if it is admitted that both the defendant and the intestate of plaintiff were negligent, the negligence of plaintiff's intestate does not bar recovery unless it was the proximate cause of the injury, and the question as to whether it was the proximate cause is for the jury, if two reasonable minds could come to different conclusions upon the question," etc.

We cannot say, as a matter of law, that the plaintiff was guilty of contributory negligence upon his own evidence, and, therefore, the questions of contributory negligence and proximate cause should be submitted to the jury.

In fairness to the litigants, it is deemed inadvisable to discuss at length the principles of law involved, for the reason that we are of the opinion that there was sufficient evidence to be submitted to the jury, and the case should be tried upon its merits, free from any intimation by this Court.

Reversed.

ROGERS & LYON, RECEIVERS, v. C. H. COZART AND W. L. UMSTEAD.

(Filed 15 December, 1926.)

1. Banks and Banking—Corporations—Reorganization — Notice — Meetings—Implied Notice—Evidence.

Where the complaining stockholders rely upon a failure to give special notice at a regular meeting of the reorganization of a bank under a different name, etc., and deny individual liabilty upon the ground that the reorganzation was invalid, evidence that they signed proxies to be used at this meeting, were given notice to exchange their old shares for the new, and that they permitted the new organization to continue business for two years without objection, etc., is sufficient notice to give validity to the reorganization and to make them individually liable for an assessment made by the receivers in an action lawfully brought under the direction of the court.

2. Same—Collateral Attack.

The validity of a reorganization of a banking institution cannot be collaterally attacked by stockholders seeking to avoid individual liability upon the ground of want of notice of the meeting of the stockholders at which the appropriate resolution therefor had been passed, under the facts of this case.

3. Same—Consent to Liquidation and Reorganization.

Held, under the facts of this case the questions of whether the defendants had actually exchanged their old shares of stock for those in the reorganized bank, or their consent to the liquidation of the old bank and the reorganization of the new one, are not decisive of the defendant's individual liability to assessment under the provisions of our statute.

APPEAL by defendants from *Devin, J.,* at April Term, 1926, of GRANVILLE. No error.

Action to recover an assessment on bank stock. The plaintiffs are receivers of the Planters Bank & Trust Company. In November, 1925, they reported to the Superior Court that in their opinion it would be necessary to assess the stockholders of the bank to the extent of their full liability on the stock. After due notice the judge of the Superior Court holding the courts of the Tenth Judicial District instructed the receivers on 18 December, 1925, to bring suit against all the stockholders, including the defendants. The suit was brought and the plain-

tiffs alleged that they were entitled to recover of the defendant, Cozart, the sum of $1,500, and of the defendant, Umstead, the sum of $700.

In their answer the defendants alleged that they had been stockholders in the First National Bank of Creedmoor, which was put in course of liquidation on 8 January, 1923; that its officers and directors without authority had thereafter applied to the N. C. Corporation Commission for a charter to do a banking business under the name of the Planters Bank & Trust Company; that at the organization of this bank less than a majority of the stock in the First National Bank of Creedmoor had been represented; that the Bank & Trust Company had not been legally organized, and that the defendants were not holders of any of its stock. The presiding judge instructed the jury to answer the first issue "Yes," and the second as to Cozart "$1,500," and as to Umstead "$700," if the jury should find the facts as testified to be true. Thereupon the following verdict was returned.

1. Were the defendants stockholders in the Planters Bank & Trust Company at the time of the appointment of the receivers thereof?

Answer: Yes.

2. Are the defendants indebted to the plaintiffs on account of assessments on said stock, and if so in what amount?

Answer as to C. H. Cozart, $1,500.

Answer as to W. L. Umstead, $700.

Judgment was rendered for the plaintiffs and the defendants appealed upon exceptions duly entered.

Royster & Royster and A. W. Graham & Son for plaintiffs.
John W. Hester and T. Lanier for defendants.

ADAMS, J. The controversy is reduced to two points raised by the exceptions: (1) whether at the close of the plaintiffs' evidence, the defendants having offered none, the action should have been dismissed as in case of nonsuit, and (2) whether there was error in the instructions given the jury, or in the refusal to give the instructions prayed.

In our opinion both points must be resolved against the defendants. They first take the position that the liquidation of the First National Bank of Creedmoor and the organization of the Planters Bank & Trust Company was without legal sanction and that they are not bound thereby, especially as to the latter—that the resolution purporting to authorize the surrender of the charter of the First National Bank and the incorporation of the Planters Bank & Trust Company was passed at a regular annual meeting of the stockholders held on 9 January, 1923, and that no notice was given them of the transaction of any unusual business. Thompson says that as a general proposition of law it is doubt-

less true, subject to exceptions, that notice need not be given of special business to be transacted at the regular meetings of the stockholders. 1 Thompson on Corp. (2 ed.), sec. 821. There is evidence that in this meeting the defendants were represented by proxy. They contend, it is true, that in their written appointment no proxy was named; but each of these appointments was signed by the defendants, who, of course, had personal notice of the meeting, and their stock was voted. Even if the special business required a notice of its nature and scope, the minutes of the Planters Bank & Trust Company show that in a meeting held on 28 February, 1923, it was resolved that before the completion of the organization all the stockholders of the liquidating First National Bank of Creedmoor should be notified to attend an adjourned meeting of the incorporators or stockholders in order that a proper exchange of the stock could be effected. 3 C. S., 217(m). All the stockholders were notified and the adjourned meeting was held on 5 March, 1923. Certificates of stock were duly signed by the president and the cashier; they were left in the stock book and not delivered, but the issue of stock was at least impliedly authorized in the meeting of 9 January, 1923, by a vote of 427 in favor of and 73 against the surrender of the old charter and the incorporation of the new bank. During these transactions the defendants neither protested nor objected; and in any event they were entitled to all the privileges of stockholders. C. S., 1170. If the bank had been successful and dividends had been declared each of the defendants could have recovered of the bank his proportionate part of the income, and it would be inequitable to permit them, with undoubted knowledge of the facts, after the lapse of two years or more to deny that they were stockholders in the Planters Bank & Trust Company, which is now insolvent.

The defendants argue that the resolution appended to the articles of incorporation is invalid because one of the witnesses testified that he had not found any minutes of the meeting held on 9 January. We find no exception to the introduction of the resolution; but if an exception had been taken we do not perceive how it could avail the defendants in a collateral attack upon the organization of a bank which transacted a regular banking business *de facto,* if not *de jure,* for a period of two or three years to the knowledge of both defendants, one of whom at least was a depositor.

Whether the defendants ever made an actual exchange of their stock in the First National Bank for stock in the Planters Bank & Trust Company is not necessarily decisive of their liability; nor is the question whether they consented to the liquidation of the former bank and the organization of the latter. According to the record these matters were legally determined by the stockholders.

We think the learned judge before whom the case was tried was correct in denying the defendants' motion for nonsuit, in declining their prayers for instructions, and in giving the instructions pertinent to the issues submitted.

We find

No error.

STATE v. BOW FRANKLIN.

(Filed 15 December, 1926.)

1. **Evidence—Dying Declarations—Witnesses—Oath—Cross-Examination.**

While a witness in a criminal action is required to testify under oath and be subjected to cross-examination, dying declarations are an exception to the rule, the apprehension of death being at least of equal solemnity as an oath, and the necessity of the case excluding the cross-examination.

2. **Same—Reasonable Apprehension of Death.**

A declaration made in the expectancy of immediate death is not inadmissible because of the fact that death did not occur until three days after the declaration was made.

3. **Same—Motive.**

Semble, the declarations of the declarant as to the prisoner's motive in killing him are competent evidence under the facts of this case.

4. **Same—Verdict—Harmless Error—Appeal and Error.**

Where it is contended that the dying declarations included the evidence of the motive of the prisoner in inflicting on the deceased the deadly wound: *Held*, the motive is not essential to a conviction of manslaughter, and, if erroneously admitted, a verdict of manslaughter cures the error, together with the exclusion of evidence offered in rebuttal by defendant.

APPEAL by defendant from *Harward, J.*, at August Term, 1926, of BURKE. No error.

Indictment for murder. From judgment on verdict that defendant is guilty of manslaughter, defendant appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

W. C. Newland and Spainhour & Mull for defendant.

CONNOR, J. No exceptions were taken by defendant to the judge's charge to the jury. The only assignments of error relied upon by defendant upon his appeal to this Court, are based upon exceptions to the rulings of the court, during the progress of the trial, resulting in the

admission or exclusion of evidence. These assignments cannot be sustained. We find no error, for which defendant is entitled to a new trial.

Witnesses for the State were permitted to testify, over objections aptly made by defendant, as to declarations made to each of them, by deceased, after he received his fatal wounds, and shortly before his death. The court found upon sufficient evidence that at the time deceased made each of these declarations he had an impending sense of his approaching death from the wounds with which he was then suffering. The testimony was competent, and was properly admitted as evidence. *S. v. Watkins,* 159 N. C., 480. Evidence of dying declarations does not depend for its competency upon a declaration by the deceased, at the time, that he was dying; for it may be shown by the attending circumstances that he was in actual danger of death, which ensued, with full apprehension of his danger. Such evidence is admissible under an exception to the rule excluding testimony which is "hearsay." The law dispenses with the sanction of an oath when the declaration is made by one who is conscious of approaching death, which thereafter ensues; it holds such declarations competent. It is an exception to the rule which requires that defendant shall have an opportunity to cross-examine witnesses whose testimony is offered as evidence against him, because of necessity. The declaration of the deceased is submitted to the jury only as evidence; its credibility and probative force is to be determined by the jury under the rules which are applicable to testimony given under oath, and subject to cross-examination.

In the instant case, at the time deceased made the declarations offered as evidence, he had been shot in the abdomen and was suffering intense pain. One of the declarations was made to a neighbor who came to his home immediately upon learning that deceased had been shot; another was made to the physician and surgeon at the hospital to which deceased was taken for an operation, and just before the operation was performed; and the other was made to a brother of deceased, on Monday morning after deceased had been fatally wounded on the preceding Sunday afternoon. Deceased said to each of these witnesses that he was "killed." Defendant's counsel did not cross-examine either of the witnesses in order to determine the competency of the testimony. There was no error in the ruling that the testimony was competent upon the evidence offered by the State. *S. v. Brinkley,* 183 N. C., 720; *S. v. Alexander,* 179 N. C., 759; *S. v. Cain,* 178 N. C., 724; *S. v. Williams,* 168 N. C., 191; *S. v. Watkins,* 159 N. C., 480; *S. v. Laughter,* 159 N. C., 488; *S. v. Finley,* 118 N. C., 1161; *S. v. Caldwell,* 115 N. C., 794; *S. v. Whitt,* 113 N. C., 716; *S. v. Whitson,* 111 N. C., 695; *S. v. Williams,* 67 N. C., 12.

All of these declarations were to the effect that deceased was shot by defendant, Bow Franklin and Ernest Barrier, who was on trial with defendant, but who was acquitted by the jury. There was ample evidence submitted to the jury, without objection, that defendant fired at deceased with his pistol, and inflicted the fatal wounds. Defendant, testifying as a witness in his own behalf, admitted that he shot deceased. He testified also that deceased had first fired at him; he contended that he shot in self-defense. The doctor testified that deceased told him that the trouble arose out of an old grudge. Defendant moved the court to strike out this testimony. The motion was denied, and defendant excepted.

Judge Pearson, in *S. v. Shelton,* 47 N. C., 360, says:

"According to the general rule, no testimony is admissible unless it is subject to two 'tests of truth,' an oath and a cross-examination. A sense of impending death is as strong a guaranty of truth, as the solemnity of an oath; but dying declarations cannot be subjected to the other test; there is no opportunity for cross-examination, and there is nothing to meet this objection and answer as an equivalent for the want of cross-examination; hence the exception in respect to dying declarations rests solely upon the ground of public policy and the principle of necessity. As in many cases the knowledge of the facts attending the killing is confined to the party killed and the perpetrator of the crime, there is a public necessity for admitting dying declarations as evidence in order to preserve life by bringing manslayers to justice; but as the exception can only be sustained on the ground of necessity, it is restricted to cases of indictment for homicide, (see, however, ch. 29, Pub. Laws 1919, C. S., 160, *Williams v. R. R.,* 182 N. C., 267), and it is further restricted to the act of killing and the circumstances immediately attending the act and forming a part of the *res gestæ.*"

Upon an application of this principle to an exception by the defendant in that case, the admission of a declaration by the deceased as to an occurrence immediately prior to the act of killing was held to be error, and a new trial was granted. In *S. v. Williams,* 67 N. C., 13, and in *S. v. Jefferson,* 125 N. C., 715, it was held to be error to admit as evidence a dying declaration in which the deceased expressed an opinion as to the identity of the person who shot him. In *S. v. Watkins,* 159 N. C., 480, language used by deceased in a statement admitted as a dying declaration, to wit: "Why did he shoot me? I have done nothing to be shot for," was held competent as a part of the dying declaration. It is said in the opinion by *Clark, C. J.:* "It was a statement of a fact. If it was doubtful, which it was, it should have been admitted, and the court should have been requested to instruct the jury to consider what the deceased meant as a matter affecting the weight

to be given to the statement. In *S. v. Mills,* 91 N. C., 594, the dying man stated that Eaton Mills had shot him. The witness asked, 'What for?' To which the deceased replied, 'Nothing.'" Defendant's exception to the admission of this testimony was not sustained.

In the instant case, the solicitor had announced to the jury that he would not contend that defendant was guilty of murder in the first degree; that he would contend that defendant was guilty of murder in the second degree. The jury by their verdict, found that defendant was not guilty of murder in the second degree, but was guilty of manslaughter. Conceding that it was error to submit the statement of the deceased that the cause of the homicide was an old grudge between defendant and deceased, as evidence upon the issue as to whether the homicide was murder in the second degree, or not, in view of the verdict of the jury that defendant did not kill deceased with malice, it must be held that it was not reversible error, for the court to refuse to strike out the statement upon defendant's motion. Upon the issue involving the charge of manslaughter, the existence of an old grudge was not material to the finding by the jury that defendant was guilty of manslaughter. Defendant testified that he had at one time been angry with deceased, because of a misunderstanding, but that at the time of the shooting he had no ill-will toward deceased. The refusal of the court to permit defendant to testify as to the facts in regard to the misunderstanding between him and the deceased was not reversible error, in view of the verdict rendered by the jury.

The remaining assignments of error have been carefully considered; they cannot be sustained. There was ample evidence, to which there were no objections, to sustain the verdict. Defendant's testimony in support of his contention that he fired at deceased in self-defense was contradicted by evidence for the State. All the evidence was submitted to the jury under a charge by the court which was free from error. The judgment is affirmed. There is

No error.

ADAIR GURLEY v. C. F. WIGGS.

(Filed 15 December, 1926.)

Wills—Devise—Estates—Conditions—Contingent Limitations—Husband and Wife.

A devise of land by a father to his daughter for life, with limitation over to her children, but should her husband predecease her then to her in fee: *Held,* construing the will as a whole, the intent of the testator was to insure the benefit of the gift to her free from the control of her

husband during his life, and the one fitting the description at the time of making the will and at the time of testator's death, was particularized as if his name had been given. C. S., 4165.

APPEAL by defendant from *Cranmer, J.*, at October Term, 1926, of WAYNE, from a judgment rendered in a controversy without action.

Ida P. Hardee died in January, 1918, leaving a last will and testament, the seventh item of which is as follows: "I give and devise to my daughter, Adair Hardee Gurley, during her natural life, all the real estate that I own in the town of Fremont, North Carolina, it being the same land conveyed to me by C. E. Thomas by deed which appears of record in Wayne County, in book 106 at page 515, and after the death of the said Adair Hardee Gurley, I give and devise the said land to the children of the said Adair Hardee Gurley, provided, however, that if the said Adair Hardee Gurley shall survive her said husband, then at the death of her husbannd the said Adair Hardee Gurley shall have an indefeasible fee-simple estate in said land."

At the time the will was executed and until his death on 12 October, 1918, T. D. Gurley was the husband of Adair Hardee Gurley. To them were born four children, all of whom are minors; two of the daughters having husbands who were living at the death of the testatrix. On 6 October, 1926, Adair Hardee Gurley, the plaintiff, entered into a written contract with the defendant whereby she agreed to sell and he agreed to purchase the land described in item seven of the will, and on 8 October, she tendered him a deed sufficient in form to convey the land in fee with full covenants. The defendant declined to accept the deed for the alleged reason that the plaintiff cannot convey a title in fee simple. Upon the agreed facts it was adjudged that the plaintiff can convey a title in fee; whereupon the defendant excepted and appealed.

Dickinson & Freeman for plaintiff.
B. F. Aycock for defendant.

ADAMS, J. The death of the testatrix occurred in January, 1918, and that of the plaintiff's husband on 12 October, 1918. The appeal is prosecuted to determine the single question whether the words "said husband" and "her husband," as used in the seventh item of the will, are restricted to the devisee's deceased husband, or whether her acquisition of the title in fee is dependent upon her surviving any one who may possibly become her husband by a subsequent marriage. In the fifth and sixth items a similar devise is made to two other daughters.

Unless modified the general rule is that a devise applies to the person answering the description at the date of the will. It is illustrated

by Williams: "A bequest by a husband to his 'beloved wife,' not mentioning her by name, applies exclusively to the individual who answers the description at the date of the will, and is not to be extended to an after-taken wife." 2 Williams on Executors (11 ed.), 867. See, also, 1 Jarman on Wills (6 ed.), 396. In *Garratt v. Neblock,* 39 Eng. Rep., 241, which is cited in support of the text, the question was whether the description was applicable only to the wife *in esse* at the date of the will and therefore as personal as if her Christian name had been inserted or whether the words were descriptive of a class. The principle is maintained in later English authorities: "As regards the rule of law, the proposition which is admitted in this case is that prima facie where the wife of a person is spoken of by a testator, and that person is married at the date of the will, in the absence of any context, the wife existing at the date of the will is the person intended to take." *In re Coley,* 2 Chan., 102.

It is true, however, that wills frequently contain provisions which indicate a meaning at variance with the general rule, as in *Peppin v. Bichford,* 30 Eng. Rep., 1160, and *In re Drew,* 1 Chan., 336. The result is that the application of general rules is often subordinated to the context and the intent of the testator as disclosed by the will in its entirety.

It was evidently the purpose of the testatrix who made the will under consideration to see that the husband should have no legal right to exercise control over the devised land, or in any way to interfere with it to the prejudice of the objects of her bounty. The daughter was to hold the land during her natural life with remainder to her children, but if she survived her husband she was to take the fee. Her husband was living at the date of the will and at the death of the testatrix. C. S., 4165. The judgment seems to be supported by the authorities: *Beers v. Narramore,* 22 At. (Conn.), 1061; *Van Syckel v. Van Syckel,* 26 At. (N. J.), 156; *Johnson v. Webber,* 33 At. (Conn.), 506; *Williams v. Alt,* 226 N. Y., 283. See annotation to *Meeker v. Draffen,* 33 L. R. A. (N. S.), 816.

Affirmed.

T. J. BARRETT v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 15 December, 1926.)

Master and Servant—Employer and Employee—Negligence—Safe Place to Work—Helpers—Evidence—Nonsuit—Questions for Jury.

It is the nondelegable duty of the master to reasonably furnish the necessary helpers for the servant to work in the course of his employment, as well as to furnish him a safe place to work and reasonably

safe tools and appliances therefor, and where there is evidence that the servant was engaged for the defendant railroad company in repairing a refrigerator car by bolting a heavy oaken plank on to its end, requiring assistance to do so, and which was customarily furnished, and that he attempted to do the work alone, under the instructions of the defendant's vice-principal, it is sufficient to take the case to the jury upon the issue of defendant's actionable negligence, and to deny its motion as of nonsuit.

APPEAL by plaintiff from *Schenck, J.*, at May Term, 1926, of RICHMOND. Reversed.

The necessary facts will be set forth in the opinion.

W. R. Jones, John C. Sikes and Stewart, McRae & Bobbitt for plaintiff.

Varser, Lawrence, Proctor & McIntyre for defendant.

CLARKSON, J. This is an action for actionable negligence brought by plaintiff against the defendant for injuries alleged to have been sustained by him. The defendant introduced no evidence and at the close of plaintiff's evidence made a motion for judgment as in case of nonsuit. C. S., 567. This motion was sustained by the court below. Plaintiff assigned error and appealed to this Court.

The testimony of plaintiff was to the effect: That on 2 January, 1924, he was engaged in car-repairing work for defendant at Hamlet. That he was directed by the foreman of defendant to make repairs on a refrigerator car. There was an end sill to be put in and plaintiff asked the foreman for some help, as he could not do it without help, but the foreman said he had no one to help him and directed him to do the work. The work to be done was to put in a splice board that went underneath the car; there were bolts to be put in and the board had to be held up. The car was so made that it was too low for him to stand on his knees and a little too high to sit down flat to do the work, so the work had to be done in a leaning position and it required a lot of strain to hold the board up. The bolts were 8 inch to go in and they had to be pushed up pretty hard and the plank had to be held, and one man could not do it by himself. At the time he was trying to do it, a pain struck him in the back, he dropped everything and the board fell on him and he could not move; it paralyzed him. The board was heavy, hard oak, 2x9 inches, 6 feet long. He could not get the bolts in with his hand. They were too close to push in. He could not get the hammer in between the bolts. He was trying to push them in but he could not do it. Sometimes they had to take a jimmy bar and prize those bolts. One man had to hold while the other did it. The foreman did not give him any helper to do this work. His body gave way, and he fell to the ground and the board fell upon him.

H. C. McRae, for plaintiff, testified: "Have worked for defendant off and on for the last eight years, repaired cars, put on splice boards, know custom of the defendant and that it was the custom in January, 1924, to furnish a helper to a carman who was required to put on a hardwood splice board two inches thick, nine inches wide and six feet long, on a refrigerator car. Plaintiff's reputation is good. (Cross-examination): I have never put a splice board on by myself. It would be hard to do, I never done it. If you could get a bolt through it would hold the splice board up, but sometimes it is hard to get the one bolt through. Sometimes they fit and sometimes they don't."

Plaintiff introduced several other witnesses who testified substantially the same.

In *Pigford v. R. R.*, 160 N. C., at p. 101, speaking to the subject, citing numerous cases, this Court said: "It is as much the duty of the master to exercise care in providing the servant with reasonably safe means and methods of work, such as proper assistance for performing his task, as it is to furnish him a safe place and proper tools and appliances. The one is just as much a primary, absolute, and nondelegable duty as the other. When he entrusts the control of his hands to another, he thereby appoints him in his own place, and is responsible for the proper exercise of the delegated authority, and liable for any abuse of it to the same extent as if he had been personally present and acting in that behalf himself. This principle is well settled." *Cherry v. R. R.*, 174 N. C., 263; *Hines v. R. R.*, 185 N. C., 72; *Crisp v. Thread Mills*, 189 N. C., 89; *Bradford v. English*, 190 N. C., 742; *Johnson v. R. R.*, 191 N. C., 75; *Clinard v. Clinard Elec. Co., post*, 736.

In cases of this kind against a railroad corporation, contributory negligence is no bar to the action—this is made so by statute, C. S., 3467. "The damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." With respect to the plea of assumption of risk, C. S., 3468, is as follows: "In an action brought against any common carrier under or by virtue of any of the provisions of this article to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risk of his employment, in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee, or the death or injury was caused by negligence."

On a motion to nonsuit, the evidence is to be taken in the light most favorable to plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom.

We think the evidence was sufficient to be submitted to the jury.

Reversed.

BEN SIMON v. G. H. MASTERS.

(Filed 15 December, 1926.)

1. Pleadings—Answers—Defenses—Counterclaim.

Where the answer to the complaint sets up no new matter but its allegations are entirely in defense, a replication by the plaintiff is unnecessary. C. S., 525.

2. Judgments, Irregular—Motions in the Cause—Judgment Set Aside—Pleadings—Issues—Counterclaim.

In plaintiff's action to recover damages of the defendant for failing to make a sufficient conveyance of his lands under a contract to do so, and the answer sets up a defense which, from its expression, the clerk erroneously regarded as a counterclaim, but which raised issues of fact for the jury, a judgment of the clerk denying relief to plaintiff is irregular, affording a remedy to plaintiff by motion in the cause.

APPEAL by defendant from *Schenck, J.*, of BUNCOMBE. Affirmed.

Charles B. McRae for plaintiff.
Zeb. V. Nettles and Z. W. Hayes for defendant.

ADAMS, J. On 6 February, 1926, the plaintiff and the defendant entered into a written agreement by the terms of which the defendant was to sell to the plaintiff a parcel of land in the city of Asheville free from all encumbrances except a lien for thirty-five hundred dollars. The consideration was $13,710, and of this sum the plaintiff paid $500 upon the execution of the contract. The plaintiff alleges that after the contract was made he discovered that the defendant's title was encumbered by a restrictive covenant that the property should not be sold or rented to any person of a designated race for a term of ninety-nine years. He then brought this suit to recover the sum he had paid on the purchase price.

The defendant denied the material allegations in the complaint and by way of a further answer alleged in substance that the plaintiff had failed to comply with his contract and that the defendant had performed all the conditions required of him and had tendered the plaintiff a title which was not encumbered and had demanded payment of the remainder due on the purchase price.

No reply was filed to the further defense, which was entitled a counterclaim also, and on 28 June, 1926, the clerk of the Superior Court gave judgment by default against the plaintiff for $13,210 with interest thereon from 6 March, and adjudged that upon the payment thereof the defendant should execute and deliver to the plaintiff a deed to the premises as provided in the contract; also that the property be sold in default of such payment.

Upon learning of the judgment the plaintiff made a motion to set it aside. The motion was denied by the clerk and an appeal was taken to the judge who vacated the clerk's judgment and declared it void. The defendant excepted and appealed.

The allegations set up in the answer do not contain new matter constituting a technical counterclaim, but are intended as a defense to the plaintiff's cause of action, which of itself is a denial of the alleged counterclaim. It was, therefore, not necessary for the plaintiff to file a reply. C. S., 525. *Galloway v. Goolsby,* 176 N. C., 635; *Tillinghast v. Cotton Mills,* 143 N. C., 268. The judgment by default destroyed the plaintiff's cause, root and branch; if it stands the plaintiff is without remedy. The defense is clearly dependent upon the plaintiff's failure to make good his allegations; if he succeeds the defense fails. It is plainly a case in which issues are raised upon the face of the pleadings. The clerk's determination of these issues resulted in an irregular judgment remediable by motion in the cause. *Finger v. Smith,* 191 N. C., 818, 819.

The judgment rendered by *Judge Schenck* is

Affirmed.

C. V. FREEMAN v. J. E. ROSE.

(Filed 15 December, 1926.)

Deeds and Conveyances—Trusts—Principal and Agent—Title.

A deed to lands made to the grantee as "trustee" or "agent" immediately following his name, without further indication that he is to take in a representative capacity appearing thereon, conveys the fee-simple title to the grantee, individually, the words "trustee" or "agent" being regarded as words "*descriptio personæ.*"

APPEAL by defendant from *Schenck, J.,* at September Term, 1926, of MECKLENBURG, from a judgment renderd on the following verdict:

1. Did the respective deeds mentioned in the complaint, copies of which are attached thereto as Exhibits "A," "B," "C," and "D," convey to and vest in the grantee therein named, John T. Patrick, individually an absolute fee-simple title to the respective tracts of land described in each of said deeds?

Answer: Yes.

Wellons & Wellons for plaintiff.

T. C. Guthrie for defendant.

ADAMS, J. On 16 June, 1926, the plaintiff and the defendant made a written contract whereby the defendant agreed to purchase and the plaintiff agreed to convey to the defendant three lots or parcels of land in Rutherford County in consideration of one thousand dollars to be paid upon the execution and delivery of the conveyance. The plaintiff and his wife duly executed a deed in fee with the usual covenants of warranty for the transfer of the three lots as agreed and made tender thereof to the defendant; but the defendant refused to accept the deed on the ground, as he contends, that the lots had been conveyed to John T. Patrick, under whom the plaintiff claims, as agent or trustee, and that Patrick held his title thereto in a representative capacity. It is admitted that after Patrick's death the lots in question were sold to make assets for his estate under a special proceeding properly instituted for this purpose, and that the plaintiff by *mesne* conveyances is the owner of whatever title Patrick acquired under his deeds.

In the deeds executed by W. D. Wilson and wife and by Edgar W. Flack for the two lots first described in the deed tendered to the defendant the grantee is John T. Patrick, agent, and in the deeds executed by the Chimney Rock Improvement Company and J. M. Flack and wife on 18 November, 1916, the grantee is John T. Patrick, trustee. If by virtue of these deeds John T. Patrick acquired the fee in his own right and not as agent or trustee, the plaintiff can convey to the defendant an indefeasible title and the defendant must accept the plaintiff's deed and pay the purchase price. Whether these grantors conveyed an estate in fee is the question to be determined.

With respect to conveyances of this character the general principle may be stated as follows: The word "agent" or "trustee" inserted immediately after the name of the grantee may be *descriptio personæ* and ordinarily it will be so construed unless the contrary can be inferred from the instrument. Whether such inference is permissible usually depends upon the circumstances of the particular case. To be valid a trust must be created in such a way as to manifest its nature and conditions, and the entitling of the grantee as agent or trustee, nothing more appearing, is generally regarded as matter of description and not of substance. Of course under some conditions the use of such a title may indicate a representative capacity, as in *Gold Mining Co. v. Lumber Co.*, 170 N. C., 273.

We find nothing in the deeds to Patrick to indicate that the word "agent" or "trustee" was intended to be other than descriptive or that he took the title other than in his individual capacity. The undisputed evidence shows very clearly that there were no beneficiaries or undisclosed principals to claim an interest in the land; and in response to the issue the jury found that the deeds vested in the grantee an absolute

fee-simple title. The defendant's motion to dismiss the action was, therefore, properly overruled. *Barrett v. Cochran,* 11 S. C., 29; *Cairns v. Hay,* 21 N. J. L., 174; *Fowler v. Coates,* 94 N. E. (N. Y.), 997; *Cotten v. Davis,* 48 N. C., 355; *Clayton v. Cagle,* 97 N. C., 300; *Plemmons v. Improvement Co.,* 108 N. C., 614; *Banking Co. v. Morehead,* 116 N. C., 410; 18 C. J., 275, sec. 240.

No error.

W. R. GRACE & COMPANY v. J. P. JOHNSON ET AL.

(Filed 15 December, 1926.)

Wills—Devises—Estates—Contingent Interests—Deeds and Conveyances—Defeasible Fee.

A devise of his homestead to the testator's son "to him and the heirs of his body, if any, and if none then to his brothers and sisters, their heirs and assigns": *Held,* the devisee named in the will may acquire a fee-simple title by deed conveying their "interests both present, past and prospective, vested and contingent," from his living brothers and sisters and the children (all of age) of such as are deceased. *O'Neal v. Borden,* 170 N. C., 483, and other cases cited as controlling.

APPEAL by plaintiff from *Cranmer, J.,* at November Term, 1926, of HARNETT.

Controversy without action, submitted on an agreed statement of facts.

On 15 December, 1920, H. L. Godwin conveyed, by full warranty deed, a certain tract of land to the defendants, J. P. Johnson and N. M. Johnson, and took, as part payment of the purchase money a promissory note of the grantee in the sum of $4,248.48, due 1 November, 1924, which said note was, for value, endorsed to the plaintiff, W. R. Grace & Co. Defendants have declined to pay the note on the ground that the deed under which they acquired the property conveys only a defeasible fee, and not a fee simple.

It was agreed that the question should be determined according to the court's opinion as to the alleged infirmity of defendant's title. Under this stipulation, the court being of opinion that the title was defective, judgment was entered for the defendants, from which the plaintiff appeals.

Kenneth C. Royall for plaintiff.
Clifford & Townsend for defendants.

STACY, C. J. On the hearing, the question presented was properly made to depend upon the construction of the following clause in the will of Archibald Bryant Godwin, who died 13 April, 1899:

"Item Third: I devise and bequeath to my beloved son, Archie Bradley Godwin, my homestead, including all buildings and fixtures thereto belonging to him and the heirs of his body, if any, there should be, and if none at his death, then to his brothers and sisters, their heirs and assigns, forever, bounded and described as follows:" (Description not in dispute.)

Archie Bradley Godwin is now living and is the father of one child, also living. Prior to the execution of a deed by the said devisee conveying the property to H. L. Godwin on 1 January, 1919, Archie Bradley Godwin had taken deeds from all his living brothers and sisters, and the children (all of age) of a deceased brother for their interests, "both present and prospective, and both vested and contingent in the land described in item three of the will of Archibald Bryant Godwin."

In view of the stipulation of the parties, it would appear that on authority of the decisions rendered in *O'Neal v. Borders,* 170 N. C., 483, and *Hobgood v. Hobgood,* 169 N. C., 485, and the principle they illustrate, judgment should have been entered for the plaintiff. These decisions are so clearly decisive of the question presented that we deem it unnecessary to do more than refer to them.

Error.

BASSETT LUMBER COMPANY v. W. M. RHYNE.

(Filed 15 December, 1926.)

Judgments—Default—Mechanics' Lien—Judgment Set Aside—Statutes—Meritorious Defense.

A judgment by default final in favor of material furnishers, etc., for a building erected on the lands of a nonresident owner, by service of summons by publication, may be set aside upon defendant's motion made in two days after he had notice of the pendency of the action, upon a finding of a meritorious defense. C. S., 492. *Burton v. Smith,* 191 N. C., 599, and other cases, cited as controlling.

APPEAL by plaintiff from *Lyon, J.,* at March Term, 1926, of MECKLENBURG.

Civil action instituted by plaintiff, a resident of Mecklenburg County, against the defendant, a nonresident of the State, to enforce a lien for materials furnished and used in the erection of a dwelling-house on a lot of land situate in Mecklenburg County and belonging to the defend-

ant at the time, but which was subsequently sold, by full warranty deed, to other parties. Service of summons was obtained by publication, and judgment by default final, for want of an answer, was entered 23 November, 1925. Execution having issued, the property was duly sold by the sheriff. On 22 March, 1926, two days after the defendant was first notified of the pendency of this action and what had taken place in consequence thereof, a motion was duly filed under C. S., 492 to set aside the judgment and for leave to come in and defend in said action. His Honor allowed the motion after finding that the defendant has a good and meritorious defense, and that the successful bidder at the sheriff's sale under the execution was not a purchaser in good faith. From this order the plaintiff appeals.

J. L. DeLaney for plaintiff.
G. T. Carswell and Joe W. Ervin for defendant.

STACY, C. J., after stating the case: The judgment must be affirmed on authority of *Burton v. Smith,* 191 N. C., 599, and *Rogers v. Piland,* 178 N. C., 70. It would only be a work of supererogation to state again what has so recently been said in these cases. See, also, *Foster v. Allison Corp.,* 191 N. C., 166, and *Miller v. Dunn,* 188 N. C., 400.

Affirmed.

DEVOE C. CLINARD v. CLINARD ELECTRIC COMPANY.

(Filed 15 December, 1926.)

1. **Master and Servant—Employer and Employee—Safe Place to Work—Sufficient Help—Nondelegable Duty—Rule of Prudent Man.**

   It is the nondelegable duty of the master to furnish to his employee doing work of a dangerous character in the course of the employment required of him, reasonably safe tools and appliances in general use for the doing of the particular work, and such help of others as is reasonably required therefor.

2. **Same—Insurer.**

   The measure of liability of the master to his servant in failing to furnish him reasonably safe tools and appliances with which to perform a dangerous duty in the course of his employment, is that of an ordinarily prudent man, and not that of an insurer of the servant's safety under the existing conditions.

3. **Evidence—Negligence—Issues—Questions of Law—Questions of Fact—Jury—Instructions.**

   Where all the evidence upon the trial of a personal injury case wherein negligence of defendant is alleged, admits of only one inference, the

question of negligence is one of law, and where therefrom more than one inference of the material ingredients of negligence arise, the fact of negligence is for the determination of the jury under proper instructions of the law from the court.

4. Master and Servant — Employer and Employee — Duty of Master—Reasonably Safe Tools and Appliances—Simple Tools.

While the master is required to furnish the servant engaged in dangerous work reasonably safe simple tools, under the rule of the prudent man, the servant experienced in their use, is presumed to have knowledge as to whether their continued use is dangerous, and ordinarily the master is not required to inspect them to see that they have not become unsafe.

5. Same—Contributory Negligence.

The failure of the master to furnish the servant reasonably safe tools and appliances to perform dangerous services, does not alone render the master liable for an injury to his servant, under the rule of the prudent man, but it is required that the injury was proximately caused by the failure of the master to perform his duty, or that the servant was not guilty of contributory negligence without which the injury in suit would not have occurred.

6. Master and Servant — Employer and Employee — Negligence — Safe Tools and Appliances—Evidence—Accessibility—Questions for Jury.

Where the servant is injured while engaged in the course of his dangerous employment, and there is evidence in defendant's behalf that he had furnished all safe tools, appliances, etc., where the work was done and at the time of the injury in suit, it is for the jury to determine, under conflicting evidence, in proper instances, not only the fact of the tools, etc., having been furnished, but also, whether they were reasonably accessible to the servant at that time.

7. Negligence—Contributory Negligence—Rule of the Prudent Man.

Where the servant is engaged in dangerous work, in the course of his employment, he is required for his own safety to use such care as one of ordinary prudence would have used under like circumstances, just as this rule would apply to the duty of the master upon the issue of contributory negligence.

8. Master and Servant—Employer and Employee—Servant's Continuing to Work Under Instructions—Contributory Negligence—Negligence.

An employee, engaged in dangerous work, anticipating danger from continuing to work with insufficient help, does not bar his right of recovery for a resulting injury, if the immediate injury was not in his contemplation, and he continued under his employer's instruction, with the belief that with the assistance furnished, he could overcome the danger by doing so.

9. Master and Servant—Employer and Employee — Dangerous Work—Tools and Appliances—Sufficient Help—Implied Knowledge.

Held, under the facts of this case, the unloading of a steel tank two feet in diameter and eight feet long, weighing 530 pounds, with projecting rivets in it, from a truck to be carried down a stairway into a cellar

where it was to be connected to a water system in a public school building, as a matter of common knowledge requires for the purpose rope, wire, or like appliances, and sufficient help, and which should have been anticipated by the master.

APPEAL from *Webb, J.*, at May Term, 1926, of FORSYTH. Affirmed.

This is a civil action for actionable negligence by plaintiff against defendant. It was tried at December Term, 1925, in Forsyth County Court.

The usual issues of negligence, contributory negligence and damage were submitted to the jury. They answered "No" to the first issue, "Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?" and did not answer the other two issues.

The plaintiff assigned some fifteen errors and appealed to the Superior Court. The only material one we consider is the charge of the Forsyth County Court judge, as follows:

(Assignment of Error No. 9.) "The second allegation of negligence, that the defendant negligently failed and neglected to furnish the plaintiff proper tools and appliances for doing the work which he was engaged in at the time he sustained the injury complained of in his complaint, is not before you, and the court is not submitting that second allegation; so when the court refers to the allegation of negligence that the plaintiff alleges it will be relative to the allegation of negligence that the defendant failed to furnish sufficient and proper help for doing the work he was engaged in doing."

The Superior Court judge sustained this assignment of error and remanded the action to the Forsyth County Court, and the judgment rendered in the Forsyth County Court be set aside and ordered a new trial. From this judgment defendant appealed to the Supreme Court and assigned error. The other necessary facts will be set forth in the opinion.

Ratcliff, Hudson & Ferrell for plaintiff.
Swink, Clement, Hutchins & Feimster for defendant.

CLARKSON, J. The defendant introduced no evidence.

We are of the opinion that the Superior Court judge was correct in sustaining the assignment of error No. 9. The complaint alleges: "(a) That defendant negligently failed and neglected to furnish the plaintiff with sufficient and proper help for doing the work he was required to do and which he was engaged in at the time of the injury herein complained of. (b) The defendant negligently failed and neglected to furnish the plaintiff proper tools and appliances for doing the work which he was engaged in at the time he sustained the injury complained of herein."

The defendant, in its further answer, says: "The plaintiff had at his command any tools and appliances which he required or needed in the execution of the work of his department; that the defendant had in its place of business at the time of this accident ropes, tackles, and other equipment that could have been used by the plaintiff had he so desired."

The evidence on the part of plaintiff was to the effect that he was in the employ of defendant in its water system department; that on the morning of 15 June, 1925, he, with another mechanic, was assigned to install a tank in the Mineral Springs School building. The tank was round, 8 feet long, 2 feet in diameter, concave at one end and convex at the other, and weighed 530 pounds, and made of steel. It was to be put in the basement of the school building. To do this it had to be carried down a concrete stairway 15 feet long and 4 feet wide. The stairway ended on a small passage about 4 feet wide and 6 feet long, surrounded by a brick wall except a door 3 feet wide leading into the boiler room in which it had to be carried. To unload the tank the truck was backed up towards the steps leading down into the basement, and the tank tilted over the truck until the concave end rested a little inside the stairway. While sliding the tank off the truck it caught on the truck at a point where a row of rivets ran around the middle of the tank. The plaintiff was down the stairway assisting with the helper to slide it down the stairway off the truck. All at once the tank jerked loose, and when it did it slid down the stairway and caught the plaintiff against the brick wall at the foot of the stairway and cut off his leg. It was contended that plaintiff at the time requested more help, but it was refused. "You will have to get by the best way you can." There was evidence that defendant furnished no appliances or tools of any kind for unloading the tank. On the other hand, defendant contended that plaintiff was employed as the head mechanic, had been in the employ of the company five years and had installed twenty-five to thirty tanks in various places; that plaintiff was instructed to get some negroes to work on the job, which included digging a trench, a mechanic in the department, and two negroes were assigned to do the work and the truck driver—three men loaded the tank at the shop and there were three who unloaded it. When the tank was half-way off the truck it was caught by the rivets and the mechanic asked plaintiff to call the two negroes who were near by digging the ditch to help unload, which plaintiff refused to do. The question of insufficient help was submitted to the jury. *Cherry v. R. R.*, 174 N. C., p. 263; *Johnson v. R. R.*, 191 N. C., p. 75.

Plaintiff testified, without objection, "The company had furnished no tools or appliances for getting this tank in the basement." This is the crux of the case.

The defendant in its brief says: "Had the plaintiff, in the case before the court, shown that a rope and tackle, ropes, skids or what-not were customarily used, or could have been used, and by the use of same the injury would not have occurred, they might have made out a case, but they did not show any of these things."

3 Labatt's Master and Servant (2 ed.), p. 2478, sec. 924a, in note, says: "In *Mercer v. Atlantic Coast Line R. Co.,* 154 N. C., 399, the Court held that the rule requiring the master to use ordinary care to furnish reasonably safe appliances applied alike to the simple and complicated tools; but that the master is not required to inspect simple tools, because the employee is presumed to be equally as conversant with the tool as the employer, and, being required to use it, is in a better situation to discover the defects." And at p. 2479 it is said: "It does not seem entirely logical to say that the master is under no obligation to exercise ordinary care to furnish reasonably safe appliances, simply because those appliances chance to be of a simple character."

In *Winborne v. Cooperage Co.,* 178 N. C., 90, it is said: "A perusal of our decisions on the subject will show that in order for liability to attach, in case of simple, every-day tools, it must appear, among other things, that the injury has resulted from a lack of such tools or defects therein which the employer is required to remedy, in the proper and reasonable discharge of his duties, and that the lack or defect complained of and made the basis of the charge is of a kind from which some appreciable and substantial injury may be reasonably expected to occur." *Whitt v. Rand,* 187 N. C., 807.

Our decisions are to the effect "that an employer of labor, in the exercise of reasonable care, must provide for his employees a safe place to do their work and supply them with machinery, implements and appliances safe and suitable for the work in which they are engaged, and to keep such implements, etc., in safe condition as far as this can be done by the exercise of proper care and supervision." *Riggs v. Mfg. Co.,* 190 N. C., at p. 258, and cases cited.

The employer is not an insurer and the negligence of the employer must be the proximate cause of the injury. In *Ins. Co. v. Boone,* 95 U. S., 117, it is said: "The proximate cause is the dominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in place and time to the loss. . . . 'The inquiry must always be whether there was an intermediate cause disconnected from the primary fault and self-operating, which produced the injury.'" *Inge v. R. R., ante,* at p. 530.

"A cause that produced the result in continuous sequence and without which it could not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable

under all the facts as they existed. *Ramsbottom v. R. R.*, 138 N. C., 41." *Lea v. Utilities Co.*, 175 N. C., at p. 463. In *Hudson v. R. R.*, 176 N. C., p. 492, *Allen, J.*, confirming the above rule, says: "To which we adhere, with the modification contained in *Drum v. Miller*, 135 N. C., 204, and many other cases, that it is not required that the particular injury should be foreseen, and is sufficient if it could be reasonably anticipated that injury or harm might follow the wrongful act." *DeLaney v. Henderson-Gilmer Co., ante*, 647.

The degree of care required of an employer in protecting his employees from injury, a few variants of this form may be stated: "It is such care as reasonable and prudent men would use under similar circumstances." "Such care as a prudent man would exercise under similar circumstances." In the words of the Supreme Court of the U. S., "The master is bound to observe all the care which prudence and the exigencies of the situation require, in providing the servant with machinery or other instrumentalities adequately safe for use by the latter." *Hough v. Texas & P. R. Co.*, 100 U. S., 213, 24 L. Ed., 612. "Such care as ordinarily prudent persons exercise under the same or similar circumstances." "He uses that degree of care 'which a man of ordinary prudence would use, having regard to his own safety, if he were supplying them (appliances) for his own personal use.' *(Cotton v. North Carolina R. Co.*, 149 N. C., 227; *Marks v. Harriet Cotton Mills*, 135 N. C., 287.)" "It is clear that the entire failure to furnish any instrumentalities or materials in a case where they are necessary for the servant's protection is not less a breach of the duty to furnish proper instrumentalities or materials than is the furnishing of instrumentalities or materials which fall below the legal standard of safety. A servant who bases his right of action on the total lack of requisite appliances must show that, under the circumstances, they were reasonably necessary for his protection from a danger which the master knew or ought to have known to be incident to the work, and that they were either not obtainable at all, or were not readily accessible. When they are not available for use at the actual place of work, it is for the jury to say whether they are reasonably accessible in such a sense as to absolve the master from the charge of negligence." Labatt, *supra*, p. 2435. *Sou. R. v. Moore*, 49 Kan., 616, 31 Pac., 138, servant's foot crushed by rail owing to the want of any proper appliances for loading it on a flat car. *Rushing v. R. R.*, 149 N. C., 158, failure to furnish hooks for moving heavy timbers. Charge as follows sustained: "That if the jury should find, by the greater weight of the evidence, that lug hooks were, at the time of the injury, used by railroads doing like work, such as moving heavy timbers, then it was the duty of the defendant to furnish the foreman with lug hooks; and should you further find, by the greater

weight of the evidence, that the timber which the plaintiff was handling was such timber, because of weight, length, ground and surroundings, as would lead a man of ordinary prudence to see it was safer to use lug hooks than to use his hands, then failure of defendant to provide, and have them for use, would be negligence, and should the jury find that this negligent act was the proximate cause of the injury, they should answer the first issue 'Yes'."

In *Murdock v. R. R.*, 159 N. C., 131, on page 132, speaking of the use of a special kind of tongs used for handling heavy steel rails, weighing about 850 pounds, the Court said: "Indeed, it ought hardly to call for proof that it was negligence not to furnish an appliance so long in use and so well known."

In *Bailey v. Meadows Co.*, 154 N. C., p. 71, it is held: "That it is the duty of the master to furnish the servant proper appliances to do dangerous work, if there are such in general use, is well settled. *Orr v. Tel. Co.*, 130 N. C., 627. This negligence of the master 'consists in his failure to adopt and use all approved appliances which are in general use and necessary to the safety of the employees in the performance of their duties.' *Marks v. Cotton Mills*, 135 N. C., 290. The master is not required to adopt every new appliance as soon as it is known." The duty of an employer to use due care to furnish sufficient help, tools, etc., to the employee is held in *Pigford v. R. R.*, 160 N. C., p. 93, to be "a primary, absolute and nondelegable duty."

It will be noted in the *Bailey case, supra,* it speaks of *dangerous work.* In such cases the appliances must be such as are in general use. The removal of the steel tank weighing 530 pounds is not necessarily dangerous, although the method of doing it may be. Simple appliances or instruments as a matter of common knowledge and observation, such as ropes, chains, etc., and sufficient help may, under certain circumstances, of necessity be needed.

As to contributory negligence of the employee, the degree of care, a few variants of this form will be stated:

"Contributory negligence in its legal significance is such an act or omission on the part of plaintiff, amounting to an ordinary want of care, as concurring or coöperating with the negligent act of defendant, is the proximate cause or occasion of the injury complained of." "Any want of ordinary care on the part of the person injured, which combined and concurred with the defendant's negligence and contributed to the injury as a proximate cause thereof, and as an element without which the injury would not have occurred." "But if any degree, however small, of the causal negligence, or that without which the injury would not have occurred, be attributable to the defendant, then the plaintiff, in the absence of any contributory negligence on his part,

would be entitled to recover; because the defendant cannot be excused from liability unless the total causal negligence, or proximate cause, be attributable to another or others. 'When two efficient proximate causes contribute to an injury, if defendant's negligent act brought about one of such causes, he is liable.' *Wood v. Public Corporation*, 174 N. C., 697, and cases there cited." *White v. Realty Co.*, 182 N. C., p. 538. "In short, it is a want of due care, and there is really no distinction or essential difference between negligence in the plaintiff and negligence in the defendant, except the plaintiff's negligence is called contributory negligence. The same rule of due care, which the defendant is bound to observe, applies equally to the plaintiff." *Moore v. Iron Works*, 183 N. C., 439; *Construction Co. v. R. R.*, 184 N. C., 180; *Boswell v. Hosiery Mills*, 191 N. C., 549; *Malcolm v. Cotton Mills, ibid.*, 729.

It is not enough that plaintiff had reason to believe that there was an insufficient number of men to do the work and his strength was not equal to the task without simple appliances or instruments. For, if the danger or risk of doing the work was not such as to threaten immediate injury, and plaintiff, by reason of his employer's instructions, was led to believe that he could carry his part of the load by the use of care and caution as a prudent man under similar circumstances, and he proceeds to do the work with the exercise of such care, without sufficient help and the simple appliances or instruments, he is not barred from recovery from the employer for the injury received. *Crisp v. Thread Mills*, 189 N. C., 89; *Holeman v. Shipbuilding Co., ante*, 236.

"What is negligence is a question of law, and when the facts are admitted or established is for the Court." Burdick on Torts (2 ed.), 429. In *Russell v. R. R.*, 118 N. C., 1111, it is stated thus: "Where the facts are undisputed and but a single inference can be drawn from them, it is the exclusive duty of the court to determine whether the injury has been caused by the negligence of one or the concurrent negligence of both of the parties." *Hinnant v. Power Co.*, 187 N. C., at p. 293, and cases cited. In the present case the facts are disputed. The burden is on plaintiff to establish negligence and on defendant to establish contributory negligence.

It is a matter of common knowledge and observation that a rope, wire, or such like, is a simple appliance or instrument that can be used in holding a steel tank with rivets on it weighing 530 pounds, as in the present case, the tank being round, 2 feet in diameter and 8 feet long. The place and surroundings of the basement of the school building where this round steel tank was to be placed was known, or, in the exercise of ordinary care, ought to have been known to defendant.

It is a question for the jury to say whether or not defendant, the employer, used such care as a reasonable and prudent man would use under similar circumstances to furnish plaintiff with sufficient men and simple appliances or instruments to do the work and was such failure the proximate cause of the injury.

For the reason given the judgment is

Affirmed.

WALTER E. WALKER v. H. W. TROLLINGER.

(Filed 15 December, 1926.)

1. Wills—Interpretation—Intent.

In construing a will, the intent of the testator, not in conflict with law, will control and be given effect in connection with the parts relating to the same subject-matter, and in proper instances, with reference to other conditions existing at the time, and which would reasonably have influenced him in making the disposition of his property.

2. Same—Estates—Remainders—Conditions—Statutes.

An estate to the testator's wife for life, expressly providing that she is to have one-half of the products of the land while she lives, without power of disposition of the estate, but to take care thereof with the timber thereon, and at her death to his nephew, upon condition that he remain on the land, take care thereof with the timber and have a certain portion of the products thereof, without power to sell the lands in a certain time, also devising certain domestic articles and animals to her absolutely, together with evidence that the nephew remained with the testator and wife, etc. *Held:* the wife and the nephew were the primary consideration of the testator and the first objects of his bounty, and after the death of the wife, and the performance by him of the conditions set forth in the will, he took a fee-simple title to the lands in preference to the ulterior takers named in the will, to wit, the testator's brother and his children. C. S., 1734.

3. Estates—Contingent Remainders—Vested Estates—Wills.

Where it appears from a proper interpretation of a will that the testator's nephew is the primary object of his bounty to the ulterior takers in remainder, and it is expressed in the will that those in remainder take upon condition that the nephew should die without leaving child or children, the birth of a lawful child to the testator fulfills the condition imposed, and without further restrictive expressions the nephew then takes the fee-simple title.

4. Wills—Interpretation—Vesting Estates in Prior Beneficiary—Constitutional Law—Statutes.

Where, by a correct interpretation of the will, it will reasonably be allowed, the law will favor the early vesting of estates against the interests of a contingent remainderman. Const., Art. I, secs. 30, 31; C. S., 4162.

APPEAL by plaintiff from *Devin, J.*, at Chambers, 28 September, 1926, of ALAMANCE. Affirmed.

L. D. Meador for plaintiff.

Dameron, Rhodes & Thomas and Coulter, Cooper & Carr, for defendant.

CLARKSON, J. This is a civil action brought by plaintiff against defendant for damages for breach of a covenant of seizin in a deed from defendant to plaintiff, made 5 November, 1923, duly recorded in Alamance County, N. C. *Newbern v. Hinton,* 190 N. C., 108. All the facts necessary for the determination of the case, and a copy of the will, was set forth in the complaint. The defendant demurred to the complaint, which was sustained by the court below.

The land which defendant conveyed with covenant of seizin to plaintiff, defendant contends was willed to him in fee simple by Jacob L. Trollinger, by will dated 17 May, 1879, duly probated 16 October, 1879. H. Walter L. Trollinger, named in the will, is the defendant, H. W. Trollinger.

For the solution of the controversy we must consider the material parts of the will: "To my beloved wife, Rebecca A., I give and bequeath all of my real estate with the following conditions: She is to have one-half of all the products of the land as long as she lives, or during her widowhood, but she shall have no power to give, bargain, lease or sell any portion of said estate, and she shall do what she . . . to take care of timber and real estate. It is my will at the death or marriage of my wife to give to H. Walter L. Trollinger all of my real estate, also all my personal property of every description, the condition of that gift is that my nephew, H. Walter L. Trollinger, remain on the lands and cultivate and take the care he can of timber lands, and in consideration therefor, he is to have one-half of all that is produced on said lands. He shall not bargain, lease or sell any portion of said land and he shall have no power in any case to sell or bargain to sell any portion of this real estate before the year 1895. It is my desire that all the personal property which belongs to my dear wife shall be given to her absolutely, which consists of the following: One white horse, one sewing machine, one set of cane-bottom chairs with a rocker; one cow, one cooking stove, one press, one bureau, one falling-leaf table, one washstand, one candlestand, one set of bedsteads, one large mirror, two beds and bedding. And my will is, that in case of the death of H. Walter L. Trollinger, without his having a child or children, then and in that case, I give all my real estate and personal property of every description to my brother, Moses B. Trollinger, and his children."

The testator died the same year the will was executed. The widow was dead at the time the land was conveyed to plaintiff. Under the will there were certain things to be done and not to be done by the defendant, Trollinger. It is admitted that all conditions or requirements were fulfilled by him. The confession is not applicable to defendant: "I have left undone those things which I ought to have done, and done those things which I ought not to have done."

The question involved: Did defendant have a fee-simple title to the land under the will? We think he did, and the court below was correct in sustaining the demurrer.

In *Edmundson v. Leigh,* 189 N. C., p. 200, it was said: "It is settled law in this State that the intent of the testator, as expressed by the terms and language of the entire will, must be given effect unless in violation of law. 'Every tub stands upon its own bottom,' except as to the meaning of words and phrases of a settled legal purport. A will must be construed 'taking it by its four corners.' *Patterson v. McCormick,* 181 N. C., 313; *Smith v. Creech,* 186 N. C., 190; *Wells v. Williams,* 187 N. C., 138"; *McCullen v. Daughtry,* 190 N. C., p. 215; *Westfeldt v. Reynolds,* 191 N. C., p. 802.

The cardinal principle or polar star is to gather the intent from the entire will. To determine this, we consider the setting—the surrounding circumstances of the testator when the will was executed; if possible reconcile and harmonize the different parts; to consider it as a whole and in all its parts. The testator had no children. The defendant was his nephew and living with him. His wife and the defendant were the primary objects of testator's bounty. He speaks of her as his beloved wife—my dear wife. The real estate is given on conditions. No doubt his wife had no one to care for her and he was making provision for her when he should "cross over the river and rest under the shade of the tree." The defendant was to remain on the land and cultivate it and take the best care he could of the timber lands. His wife was to have one-half the products of the lands and his nephew the other half. His wife had no power to give, bargain, lease or sell any portion of the lands. All the personal property which belonged to her is specifically mentioned and is given her absolutely—no doubt everything to remain intact—and his nephew to remain on and cultivate the land. At the death or marriage of his wife, all the real estate and personal property is given to defendant. He shall not bargain, lease or sell any portion of the land and no power in any case to sell or bargain to sell any portion of the *real estate before the year 1895. "And my will is that in case of the death of H. Walter L. Trollinger, without his having a child or children, then and in that case,"* the real estate and personal property he gives to his brother, Moses B. Trollinger, and his children.

At the time defendant conveyed the land to plaintiff, he was 65 years old and had had eight children born alive to himself and his wife, five of whom are now living, the oldest 28 years of age and the youngest 16 years of age.

Under our form of government the law favors the early vesting of estates to the end that property may be kept in the channels of trade and commerce. Hereditary emoluments and perpetuities are contrary to our Constitution, Art. I, secs. 30 and 31. This policy of the law is clearly indicated by C. S., 4162: "When real estate shall be devised to any person, the same shall be held and construed to be a devise in fee simple, unless such devise shall, in plain and express words, show, or it shall be plainly intended by the will or some part thereof, that the testator intended to convey an estate of less dignity."

Primogeniture, which existed under the Mosaic and English law, never took root in the states of the Union. Estates tail were soon abolished. "Fee Tail. Of these estates it is only necessary to say that they existed in this State in Colonial days; that by section 43 of the Constitution of 1776 it was provided that, 'The future Legislature of this State shall regulate entails in such a manner as to prevent perpetuities'; that in 1784 the Legislature passed an act by which all estates tail then in existence were converted into fee-simple estates, and it was enacted that all such estates as should be thereafter created should be deemed to be in fee simple." Mordecai's Law Lectures, vol. 1, p. 498. C. S., 1734.

Estates are now held in the British Isles granted by the Norman Conqueror, William (1085), and by the Bruce, after the Battle of Bannockburn (1314), estates tail general or special, estates tail male and estates tail female. The heavy tax brought about by the World War has forced many of the estates entailed to be divided up and sold. Thus the land is gradually getting into possession of the masses. In the States of the Union, this heirarchy under our conception of freedom could not exist. To get rid of the feudal tenure and system and consequent vassalage were some of the reasons why our forefathers left the mother country.

What is the meaning *"without his having a child or children, then and in that case"?* We think it clearly means what it says—that at the death of H. Walter L. Trollinger, if he, during his lifetime had no child or children, the estate then and in that case would go to his brother and his children. Having a child in his lifetime, the happening of the contingency, the estate became vested and defendant acquired a fee simple estate in the land. The estate vested on the happening of the contingency of having a child.

Webster's dictionary: "Having: Act or state of possessing; thing possessed."

In *Dunn v. Hines,* 164 N. C., p. 113, the language in the will to be construed, was: "And at the death or marriage of my said wife, then I give said tract of land to my said daughter, Carrie F. Isler, during her natural life; and if she shall marry and have children to arrive at the age of 21 years, then my said daughter and her children then living, together with the children of any deceased child, shall have tract of land absolutely in fee simple forever. And if my said daughter should die without marriage and children of the age of 21 years or bodily heirs of such children, then I give said tract of land to my son," etc. The daughter married and had a child who attained the full age of 21 years. The Court said at p. 117: "In the first limitation he declared that if his daughter, Carrie, should marry and have children, who attained to the age of 21 years, *then* she and her living children and the children of any deceased child should have a fee simple in the land absolutely. What does this mean? What else can it mean than that the estate is to vest absolutely in fee, in the lifetime of his daughter, when she married and had such children, for he says, in so many words, it shall 'then' vest." And at p. 121: "These facts show conclusively that the testator intended that the estate should absolutely vest in his daughter and her children as soon as there was a child of full age."

We think that *Bell v. Keesler,* 175 N. C., p. 525, citing the *Dunn case, supra,* is similar to the facts in the present action. The language construed: "In event of my dying and no child or children by my beloved wife, Laura Amanda Glover, live to become of age, or marriage, or die without heirs, I then give, devise," etc. Laura Amanda Glover died and left one child, Maria Anna Glover, who, when unmarried about the age of 50, executed the conveyance in controversy. This Court held that she had an unqualified estate in fee simple and on the death of her mother she was to have all the property in absolute ownership, either on her becoming of age or on her death having heirs in the sense of children or offspring. The Court says, at p. 528: "In ascertaining whether there is an intent in the face of the will or deed to fix an earlier period when the estate shall become absolute, we have held in numerous cases that the instruments should be construed in reference to the recognized principles that the law favors the early vesting of estates, and that the first taker is ordinarily to be regarded as the primary object of the testator's bounty, and more especially so when such taker is a child or lineal descendant. *Bank v. Murray,* 175 N. C., 62; *Dunn v. Hines,* 164 N. C., 113; *Robertson v. Robertson,* 190 N. C., p. 558.

In *Jeffreys v. Conner,* 54 English Reports, p. 393 (28 Beav. 328), it is said: "The Master of the Rolls (Sir John Romilly): On the other point, the only way of cutting the knot is to hold that dying 'without

having any child or children,' means 'without having had any child,' and that dying 'without any child or children,' means 'dying without any child or children living at the death.' It is a very capricious disposition on the part of the testator, but if he has thought fit to do so, I should be making a will for him if I were to alter it; besides, there is this difficulty—must I alter the first clause to make it agree with the second, or the second to make it agree with the first? The only way is to give effect to each clause as if it were by itself. He has said: 'If my son, Charles, die without having any child or children,' that cannot take place, because he has had a child, and therefore that gift over does not take effect."

In Weakley ex dem., *Knight v. Rugg,* 101 English Reports, 998 (7 T. R., 322), it is said: "A., having three daughters, B., C. and D., by will gave a small legacy to B. and C., and then gave a leasehold estate to D. 'But if she died without having child or children' then 'to B., and after her to her child or children'; D. had a child who died in her lifetime: *Held,* that D. took the absolute interest in the term and consequently that she might dispose of it by will."

For the reasons given, the judgment of the court below is

Affirmed.

THE STATE AND BOARD OF COMMISSIONERS OF MECKLENBURG COUNTY, ON THE RELATION OF Z. M. HOUSTON v. G. C. DEHERRODORA, J. N. DODGEN, S. S. ROGERS AND R. R. HAZLEWOOD, AND NEW AMSTERDAM CASUALTY COMPANY, AND MASSACHUSETTS BONDING AND INSURANCE COMPANY.

(Filed 15 December, 1926.)

1. **Arrest—False Arrest — Intoxicating Liquors — Spirituous Liquors—"Transportation"—Statutes.**

An arrest may not be lawfully made by the properly authorized officers of the law for the violation of our prohibition law, for the transportation of intoxicating liquors upon mere unfounded suspicion arising from information received that the supposed offenders would thus transgress the law on a future occasion, and an arrest so made, not upon an offense committed in the officers' presence or to their personal knowledge as to the particular offense, and without a search warrant, is unlawful and entitles the plaintiff in his action therefor, to recover damages. 3 C. S., 2411(f).

2. **Same—Resisting Arrest—Evidence—Questions for Jury.**

Where there is evidence that the officers of the law while arresting one on trial for a criminal offense found it necessary to fire upon the car in which the accused was fleeing, and that the latter, under the

impression that the purpose of his pursuers was that of robbery, used only the force necessary to his resisting them under this impression, questions are raised for the jury to determine whether under the evidence the officers acted only with the force necessary for their purpose, and also as to the truth of the defense interposed.

3. Arrest—Officers—Unnecessary Force.

Where the officers of the law wilfully and intentionally use more force than is necessary for their purpose, they are acting beyond the authority conferred upon them by law as such officers, and are liable as individuals for damages for the consequences of their unlawful act.

4. Assault—Arrest—Officers.

The unnecessary use of a pistol by an officer in making an arrest under unjustifiable circumstances, is an assault.

5. Arrest—Damages—Principal and Surety—Appeal and Error.

Where an unlawful and unwarranted arrest has been made by the officers of the law and damages are recoverable against them, the sureties on their bonds are not liable in excess of the penalty on the bonds of each of the defendants separately given, and a judgment otherwise is erroneous.

APPEAL by defendants from *Lyon, J.*, at April Term, 1926, of MECKLENBURG. No error.

Action to recover of defendants damages for assault upon and wrongful imprisonment of plaintiff relator, in breach of official bonds executed by the individual defendants, as principals, and the corporate defendants, as sureties. Said bonds were executed by the individual defendants as rural police officers of Mecklenburg County. Defendants denied that they assaulted plaintiff, or wrongfully imprisoned him, as alleged in the complaint. They allege that they lawfully arrested plaintiff, and lawfully pursued him, after he attempted to escape.

The issues were answered by the jury, as follows:

1. Did the defendants, G. C. DeHerrodora, J. N. Dodgen, S. S. Rogers and R. R. Hazlewood, wilfully and wrongfully assault the plaintiff, Z. M. Houston, with deadly weapons, without just and lawful cause, as alleged in the complaint? Answer: Yes.

2. Was the plaintiff, Z. M. Houston, wrongfully and unlawfully detained and restrained of his liberty by the said defendants? Answer: Yes.

3. What damages, if any, is the plaintiff, Z. M. Houston, entitled to recover of defendants? Answer: $2,000.00.

From judgment upon the verdict, defendants appealed to the Supreme Court.

J. D. McCall and F. C. Hunter for plaintiffs.

T. L. Kirkpatrick and Flowers & Boyd for defendants.

CONNOR, J. On 22 February, 1925, the individual defendants were rural police officers of Mecklenburg County. Each had been duly appointed to his office by the board of commissioners of said county, under the provisions of chapter 664, Public-Local Laws, 1917. Each, upon his appointment and qualification had executed a bond, conditioned as required by section 6 of said statute. The penal sum of each bond was $1,000. Defendant, New Amsterdam Casualty Company, was surety on the bond of G. C. DeHerrodora, and defendant, Massachusetts Bonding and Insurance Company, was surety on the bond of each of the other individual defendants. All of said defendants were on duty at the time plaintiff, Z. M. Houston, alleges that he was assaulted and wrongfully and unlawfully imprisoned by defendants.

Plaintiff, Z. M. Houston, lives on his farm about twelve miles from the city of Charlotte. For ten or twelve years has been selling milk and butter to customers living in the city of Charlotte. During the month of February, 1925, he was employed at the Ford plant in said city doing night work. During the afternoon of 21 February, 1925, he left his home in the country and went to Charlotte in his Ford touring car. He had in his car several milk cans, containing milk to be delivered to his customers. After delivering the milk and attending to other business in the city, he went to the Ford plant, about 7 o'clock p. m., to begin his night work. He left his car, with the empty milk cans, between the seats, in front of the plant, and soon thereafter began his work in the plant. He worked until 3 a. m., when, having completed his work for the night, he left the plant and started to his home in the country in his car. This was in accordance with his custom. Just before reaching the point at which Keswick Avenue, on which he was driving, intersects with the National Highway, which leads from the city to his home, he observed the reflection of lights from a car coming up the highway towards the intersection. He stopped his car on Keswick Avenue, in order that the car might pass before he entered upon the highway.

Defendants, rural police officers, were in the car on the highway. They had received information, during the preceding afternoon, that plaintiff would be at the intersection of Keswick Avenue and the National Highway, at about 3 a. m. on the following morning for the purpose of transferring, then and there, from his car to another car, a large quantity of intoxicating liquor, which they were informed he would have in his car, in milk cans. Defendants were there at about 3 a. m. for the purpose of searching plaintiff's car, and of arresting him upon a charge of violating the Prohibition Law, when he appeared. Neither of defendants had a warrant, authorizing them to search the car, or to arrest plaintiff. Defendants, however, had authority, as rural

police officers, by virtue of section 5 of ch. 664, Public-Local Laws, 1917, to arrest without warrant for "any freshly committed crime," whether committed in their presence or not. It is provided in the statute that "when an arrest is made without warrant, the person so arrested shall be forthwith carried before a trial officer of the county and a warrant of arrest procured, to the end that the person charged may be dealt with according to law."

There is conflict in the evidence as to what occurred when defendants first saw plaintiff in his car at the place where they were informed he would be at that hour. The evidence on behalf of plaintiff tended to show that one of the defendants, without arresting plaintiff upon any charge, or speaking to him, assaulted plaintiff with a pistol, as he sat in his car, with his motor running, and that the other defendants were present aiding and abetting in the assault. The evidence for defendants tended to show that plaintiff had parked his car on Keswick Avenue, in the city of Charlotte, in violation of the traffic ordinances of the city; that defendants arrested plaintiff for this crime, freshly committed in their presence; and that plaintiff at first submitted to the arrest. All the evidence is to the effect that after defendants came upon plaintiff, sitting in his car at the intersection of Keswick Avenue and the National Highway, and after defendants had attempted to search his car, with a flashlight, plaintiff suddenly turned his car and drove rapidly in the direction of the thickly populated section of the city of Charlotte, and that defendants pursued him in their car for a quarter of a mile or more. Plaintiff testified that he attempted to escape from defendants because he thought they were robbers; defendants, each, testified that they were in their uniforms, and as officers called upon plaintiff by name repeatedly to stop his car. Plaintiff testified that as they pursued him, defendants fired at him, with their pistols, 15 or 20 shots; plaintiff's testimony was corroborated in this respect by other witnesses. Defendants testified that they fired only three shots at the tires on plaintiff's car. Three of the tires were struck by shots from defendants' pistols, causing them to burst. Because of the bursted tires, and of the speed at which plaintiff was driving, in his endeavor to escape from defendants, when he came to the railroad bridge his car swerved and struck the curb. Defendants then overtook plaintiff and searched his car. There was no intoxicating liquor in his empty milk cans or in his car. All the evidence was to the effect that plaintiff had not violated the Prohibition Law. There was sharp conflict in the evidence as to whether or not he had violated the traffic ordinance by parking his car on the wrong side of Keswick Avenue, with his lights out, and as to whether or not he had, in his effort to escape from defendants, knocked defendant, DeHerrodora, down with his car, wilfully and intentionally.

This evidence was properly submitted to the jury by the court, and defendants' motion for judgment as of nonsuit, made at the close of the evidence, was properly denied.

The conduct of defendants, as shown by the evidence for the plaintiff, which was accepted by the jury as true, was clearly wrongful and unlawful. Defendants were, upon all the evidence, without authority to search plaintiff's car, or to arrest him, upon a charge that he had violated the Prohibition Law. They had no warrant, authorizing the arrest or the search upon this charge. They had no information of a "freshly committed crime," resulting from a violation of the Prohibition Law, for which they were authorized to make an arrest, without a warrant, under section 5, chapter 664, Pub.-Loc. Laws, 1917. They had no authority to search plaintiff's car without a warrant, under section 6, ch. 1, Pub. Laws, 1923 (3 C. S., 3411(f), for neither of them saw or had "absolute personal knowledge" that there was intoxicating liquor in his car. *S. v. Simmons, ante,* 692; *S. v. Godette,* 188 N. C., 497.

Defendants do not contend that they arrested plaintiff for violating the Prohibition Law. They contend that they arrested him for violating the traffic ordinances, by parking his car, with lights out, on the wrong side of Keswick Avenue, and that this violation of law was committed in their presence; they also contend that plaintiff, in order to escape after such arrest, wilfully and unlawfully ran his car against defendant, DeHerrodora, and knocked him down, and that they pursued him in order to prevent his escape, and also in order to arrest him for an assault upon DeHerrodora. Plaintiff denied that he was violating the traffic ordinance or that he ran his car, wilfully and unlawfully against DeHerrodora; he further denied that he was lawfully arrested upon any charge by defendants or that their pursuit of him was lawful. These were the vital contentions in this case. The court instructed the jury as follows:

"Now, if you find that he was parked on the wrong side of the road, that would be a violation of the city ordinance; but the court charges you that *parking* does not mean stopping temporarily for another man to pass. He must be *parked.* The purpose of the law in not permitting parking on the wrong side of the street is to prevent a collision in which some one may be killed, or a car damaged; if a man is in his car with the motor running, and is there only momentarily or temporarily for the purpose of permitting some one else to pass, that does not, as I construe the ordinance, come within the contemplation of the ordinance, for all laws and all ordinances are presumed to be reasonable, governed by the laws of reason.

"But if you find that plaintiff was actually parked with his lights out on the wrong side of the road, although defendants might not have gone there for that purpose, they would have the right to arrest plaintiff for that. If you further find that he wrongfully, after having been arrested, or whether he was arrested or not, if he intentionally or recklessly ran his car against DeHerrodora, that would be an assault upon him, and they would have had the right to arrest him for that offense. And the court charges you that whether or not he had been arrested, or if he had been arrested and was escaping, or was endeavoring to escape, before arrest, defendants had the right to use such force as was reasonably necessary to make the arrest or to prevent the escape; if you find from the evidence that it was necessary, under the exigencies of the occasion for them to shoot at the wheels of the car, if defendants were shooting at the wheels, and not at plaintiff, not endangering his life, why they would not be guilty of an assault in that regard, because they would have the right to disable his car for the purpose of making an arrest, or preventing an escape. They would have no right, however, to shoot at plaintiff himself, endangering his life."

Defendants' assignments of error based upon exceptions to those instructions cannot be sustained. They are based upon defendants' contentions, both as to the facts and as to the law applicable. If defendants did not arrest plaintiff, as plaintiff contends, but pointed a pistol at him while he sat in his car, and then attempted to search the car, this was an assault; or, if defendants, without having arrested plaintiff, or without having called upon him as officers to submit to an arrest, pursued plaintiff as he drove away, firing at him with their pistols, their conduct was wrongful and unlawful. The question as to their good faith was not involved in defendants' contentions as to the facts. The law with respect to the degree of force which an officer may use in making an arrest, or in pursuing one charged with crime, is not necessarily determinative of defendants' liability to plaintiff for the results of their conduct upon the facts found by the jury.

The admonition of *Justice Foster,* in his Crown Law, p. 319, quoted by *Walker, J.,* in *Sossaman v. Cruse,* 133 N. C., 470, seems applicable to these defendants: "It behooves the officers of the law to be very careful that they do not misbehave themselves in the discharge of their duty, for if they do, they may forfeit its special protection."

It is well for officers of the law, especially for those whose duty it is to patrol the streets and highways of the State, to be mindful, always, that their first duty is to protect the honest, law-abiding citizen in the enjoyment of all his rights under the law. It is sometimes difficult for an officer, under circumstances confronting him, suddenly and without warning, to distinguish between the criminal who is using the streets

and highways for evil purposes, and the good citizen who is using them for lawful purposes only. Officers must necessarily sometimes make mistakes. They should recognize this fact, and be prudent in the performance of what appears under the circumstances to be their duty, and thus avoid or at least lessen injury to one who may appear to be violating the law, but who in fact is innocent of wrong-doing. It is the duty of a good citizen, and a law-abiding man, always to submit to lawful arrest; the law is amply sufficient to protect one who has been erroneously arrested, and thus temporarily deprived of his liberty. An officer, who is mindful of his duty and prudent in the performance of it, if he makes a mistake in good faith, is entitled to and will receive the protection of the law. It is only when an officer is neglectful of his duty, or disregardful of the rights of others, that he will or should be held responsible for the consequences of his acts. When there is conflict in the evidence upon issues involving the conduct of an officer, all the evidence must be submitted to the jury, in order that the facts may be found, and his liability, if any, determined.

A careful examination of defendants' assignments of error appearing in the case on appeal leads us to the conclusion that there were no errors in the trial of this case for which defendants are entitled to a new trial.

There is, however, error in the form of the judgment. Upon the verdict, plaintiff is entitled to recover of the four individual defendants, his damages as assessed by the jury; these defendants are liable as joint *tort-feasors* for the full amount of the damages. The sureties, however, are liable only in accordance with the terms of their bonds. The liability of the New Amsterdam Casualty Company, as surety on the bond of G. C. DeHerrodora, is limited to the penal sum of the bond, to wit, $1,000; the liability of the Massachusetts Bonding and Insurance Company, as surety for each of the other individual defendants, is limited to the penal sum of each of said bonds, to wit, $1,000. The action must be remanded that the form of the judgment may be modified. Judgment should be rendered against each of the sureties for the full amount of the bond, to be discharged upon the satisfaction of the judgment against its principal, or by the payment of not less than the full amount of its bond, by the surety. The error in drafting the judgment was due evidently to an inadvertence.

Upon the trial there is

No error.

N. A. ARCHIBALD v. N. L. SWARINGEN AND D. L. BARNHARDT.

(Filed 15 December, 1926.)

1. Landlord and Tenant—Leases—Contracts—Stipulations—Termination of Lease—Repairs.

Where a swimming pool is leased for a year, under a written contract that the lease would terminate upon the pool becoming unfit for use: *Held*, a crack in the walls thereof by which the pool was drained of water, and repaired by the lessor at an inappreciable sum, is not sufficient to give the lessee the right to cancel the lease when repair was made under a parol agreement within a reasonable time. C. S., 2352.

2. Same—Reasonable Time.

Where the controversy is made to depend upon whether the damage to the leased premises had been repaired by the lessor within a reasonable time, when the extent of the damage is insufficient to terminate the lease under its written terms, in this case the repair of walls of a dam to a swimming pool, evidence that three days had elapsed between the time the lessor and lessee had agreed upon the repairs necessary and the time the repairs were made, is sufficient to sustain an affirmative verdict that they were made in a reasonable time.

3. Verdict—Issues—Interpretation.

Where the verdict of the jury has determined that the leased premises was rendered unfit for the purposes of the lessee, which, under the terms of the instrument may terminate it, if of sufficient consequence, the verdict to another issue that the repairs were made in a reasonable time should be construed to harmonize with the first one.

APPEAL by defendants from *McElroy, J.*, at August Term, 1926, of CABARRUS. No error.

Action to recover rent alleged to be due under a lease from plaintiff to defendants. Defendants denied liability for rent, as alleged in the complaint, contending that by virtue of a stipulation contained therein and also of the provisions of C. S., 2352, the lease had terminated.

The issues were answered by the jury as follows:

1. Did the defendant, N. L. Swaringen, execute the lease as alleged in the complaint? Answer: Yes.

2. Did the defendant, D. L. Barnhardt, guarantee the performance of the conditions set forth in the lease and the payment of the rents to an amount not to exceed the sum of $1,300, as alleged in the complaint? Answer: Yes.

3. Was the swimming pool mentioned in the complaint cracked and rendered unfit for use without fault of the defendant, as alleged in the answer? Answer: Yes.

4. If so, did the plaintiff repair the same within a reasonable time? Answer: Yes.

5. In what amount, if any, are the defendants indebted to plaintiff? Answer: $1,300.

6. In what amount, if any, is the plaintiff indebted to defendants? Answer: $195.00.

From judgment upon this verdict that plaintiff recover of defendants the sum of $1,105, interest and cost, defendants appealed to the Supreme Court.

Armfield, Sherrin & Barnhardt for plaintiff.
Palmer & Blackwelder for defendants.

CONNOR, J. On 29 May, 1925, plaintiff leased to defendant, N. L. Swaringen, a certain lot of land, described in the lease, which was in writing, and duly executed by both plaintiff and defendant, for a period of one year. There was located on said land a swimming pool, which added largely to its value as a recreation park and public playground. The property was known as the Archibald Swimming Pool. Defendant agreed to pay as rent for said property the sum of $1,300 per annum, payable in monthly installments of $108.33, the first payment to be due on 29 June, 1925, and subsequent payments to be due on the 29th day of each month thereafter, during the period of the lease. On 6 June, 1925, defendant, D. L. Barnhardt, for a valuable consideration, and in writing, guaranteed the payment by defendant, N. L. Swaringen, of the rent and also the performance by him of the covenants in the lease. Defendant, N. L. Swaringen, entered into possession under the lease, paid the installment of rent due on 29 June, 1925, and has defaulted in the payment of the installments due subsequently. This action was commenced on 7 June, 1926, to recover the balance due on the rent under the lease, and also certain sums of money which plaintiff alleges he has paid out on the property, for which he contends defendants are liable.

On Thursday night, 29 July, 1925, the wall of the swimming pool cracked, and the water began to leak out. On the next morning, defendant, Swaringen, notified the plaintiff that the wall had cracked the night before and that the water was leaking through this crack. Plaintiff and defendant went to the property and examined the crack. It was agreed between them that the water should be drained out of the pool, so that it could be repaired. Plaintiff agreed to have the wall repaired on the Monday following, and defendant remained in possession of the property until Saturday night, when he gave a public dance there, in accordance with an advertisement which he had previously made. On Saturday, 31 July, 1925, plaintiff presented to defendant a bill for the rent due on 29 July, 1925, and defendant promised to pay

the same on Monday. On Monday the crack was repaired by plaintiff at a cost of $50.00.

On 4 August, 1925, defendant notified plaintiff, by letter, that he thereby surrendered his lease on the property, for the reason that the crack in the wall of the swimming pool had rendered the property unfit for use and occupancy for the purpose for which defendant had leased the property; defendant further notified plaintiff that he denied liability for further rent under his lease. On 7 August, 1925, plaintiff notified both defendants that he denied the right of defendant, Swaringen, to surrender the premises for the reason assigned, and further that he would hold both defendants for the rent due and to become due under the terms of the lease. Defendant, Swaringen abandoned the leased premises on the Saturday night, after the wall of the swimming pool cracked, and before the Monday on which it was repaired by plaintiff. Plaintiff had no notice of such abandonment until after the repairs had been made.

It is stipulated in the lease that "if the said buildings should be destroyed or rendered unfit for use by fire or other casualty during said term, this lease shall terminate." Defendants rely upon this stipulation and upon C. S., 2352, to sustain their contention that they are not liable for rent which accrued after the wall of the swimming pool cracked, on the night of 29 July, 1925. They say, that "on 30 July, 1925, the wall of the swimming pool bursted and became damaged to such an extent that no water could be contained in the swimming pool, and became damaged to such an extent that the same could not be repaired for a number of days; whereupon the defendant immediately notified the plaintiff and the plaintiff agreed to repair said damage immediately, and the defendant held over under said lease from Thursday night until Saturday night, 1 August, 1925, at which time the plaintiff had taken no steps toward repairing said swimming pool, and the defendant, in accordance with the provisions of the statute and the terms of the lease, surrendered said leased premises to the plaintiff as he had a right to do, and thereby completed the cancellation of the lease, notified plaintiff of his intention and surrendered the lease in accordance with its terms, and the defendants, and each of them, deny that they are liable for any rent beyond that time." Defendants allege that they expended certain sums on the property for which plaintiff is liable to them and plead the same as a counterclaim or set-off to plaintiff's recovery of the installment of rent due on 29 July, 1925, which defendants admit has not been paid.

Defendants excepted to the submission by the court, over their objection, of the 4th issue. Upon their appeal they rely chiefly upon their assignments of error based upon this exception, and upon an exception to the instruction of the court upon this issue, in the charge to

the jury. They contend that an affirmative answer to the 4th issue is immaterial; that upon the affirmative answer to the 3rd issue, plaintiff is not entitled to recover rent under the lease, which accrued after the date on which the swimming pool, because of the crack in the wall, without fault of defendants, became unfit for use.

Defendants were not released of their obligation under the lease, to pay rent for the leased premises, under C. S., 2352. No issues were tendered by defendants upon which facts could have been found by the jury, to sustain the defense under this statute. It affirmatively appears from the uncontradicted evidence that the swimming pool was repaired and thereby made reasonably fit for the purpose for which the property was leased at an expense of $50. The annual rent stipulated in the lease was $1,300. The statute provides that a lessee may surrender the leased property and be thereby discharged from all rent accruing thereafter, if the property is damaged to such an extent that it cannot be made reasonably fit for the purpose for which it was hired, except at an expense exceeding one year's rent of the premises.

Defendants, in their answer allege, in effect, that plaintiff failed to repair the swimming pool within a reasonable time, and that for this reason the lessee surrendered the property on Saturday succeeding the Thursday night on which the wall cracked. In his reply, plaintiff alleges that he caused the repairs to be made promptly, in accordance with his agreement with the lessee. All the evidence shows that the repairs were made on Monday, after the agreement was made on Friday afternoon. The 4th issue arises upon the pleadings and was properly submitted to the jury. We find no error in the instructions of the court upon this issue. The jury found that plaintiff repaired the swimming pool within a reasonable time. Upon this finding, the court properly held that the lease had not terminated, as contended by defendants. It is clear from the pleadings and from the evidence that defendants relied upon the failure of plaintiff to repair within a reasonable time, and not upon the termination of the lease by the crack in the wall as a defense to plaintiff's recovery. It might well have been contended under the facts of this case, that the damage resulting from the crack in the wall, which was repaired in a few days, at a cost of $50, was not such a destruction of the building as, under the stipulation, terminated the lease. See *Wall v. Hinds,* 4 Gray (Mass.), 256, 64 Am. Dec., 64, cited in 16 R. C. L., p. 963, sec. 473, n 4.

The answer to the 4th issue is determinative of plaintiff's right to recover in this action. The answer to the 3rd issue, under the evidence and the charge of the court, must be construed, for the purpose of the judgment, together with the answer to the 4th issue. The judgment is affirmed. We find

No error.

C. R. GRIER, ADMINISTRATOR, v. TODD GRIER AND C. L. ETHEREDGE.

(Filed 15 December, 1926.)

1. Master and Servant—Employer and Employee—Principal and Agent—Negligence—Scope of Employment.

The test of the liability of the master for the negligent act of the servant causing damages to another, under the implied scope of the agent's authority in such matters, primarily depends upon whether the act complained of falls within the servant's obligation of service, or whether the servant was acting solely for his own purpose unconnected with his master's service.

2. Same—Automobiles—Dealers—Intoxicating Liquors.

Where the servant becomes drunk when driving an automobile for the business of his master, when the latter was unaware of the fact that his servant was addicted to drink, and had no reason to anticipate it on the occasion complained of, the mere fact that he permitted his servant to keep a car in his possession, as the nature of the business appeared to him to require, does not render him liable for an injury inflicted on another by his servant when under the influence of drink, upon an occasion on which the servant, without the knowledge of his master, took the car entirely for his own purpose or pleasure, and which the master had not expressly or impliedly authorized.

3. Same—Sales Agents.

Where a dealer in automobiles designates from time to time automobiles to be used by his salesman for demonstration purposes alone, permitting him to keep the car at his home, and the servant takes the car out on Sunday for his own purposes, and while intoxicated runs upon and injures another person, and there is no evidence that the owner knew or was reasonably aware that his salesman drank intoxicating liquor, or would so use the car: *Held*, the owner is not liable for the damages thus caused, the same not being within the scope of the servant's duties, or the purposes of his employment.

4. Automobiles—Traffic Rules—Parking Laws.

It is not a violation of a parking law for a driver of an automobile to stop his car, keeping the motor running, long enough for the anticipated passing of another car speeding behind him to pass him on the highway.

CIVIL ACTION, tried before *Harding, J.*, and a jury, at April Term, 1926, of MECKLENBURG.

The plaintiff is administrator of Mary Grier, who was killed on 8 September, 1924, on East Trade Street in the city of Charlotte; plaintiff's intestate was killed by being struck by an automobile driven by the defendant, Todd Grier.

The evidence tended to show that at the time plaintiff's intestate was struck and killed by Todd Grier that he was drunk and was oper-

ating the car in a careless and negligent manner. Indeed, he does appeal from the judgment rendered. At the time of the injury, Todd Grier was employed by the defendant, Etheredge, who was engaged in the automobile business and trading under the name of Etheredge Motor Sales Co. The defendant, Grier, had been employed by said Etheredge a little over a year as an automobile salesman. He was working on a commission basis and was paid on the actual cars sold. If no cars were sold by said salesman he received no compensation. The defendant, Etheredge, furnished his said salesman a car "for demonstration purposes." The car used by the defendant, Todd Grier, at the time of the death of plaintiff's intestate, was one which he had habitually driven as a demonstration car.

The defendant, Grier, testified: "I would take a new car and drive it for a while and maybe I would sell it. I would get another car and drive it and sell it, and that is the way with this car I was driving. I had been driving this particular car which I was driving when I killed this old woman three or four months. I had been using it and going back and forth in it from the Etheredge Motor Sales Company place of business to my home, and also in going anywhere I wanted to go trying to make sales. I used it for hunting up prospects. It was not the only car I had to use. . . . I had friends whose car I used, but I would also use the company's car for any purpose. I kept the demonstration car at night at home in the garage at the place where I roomed on Torrence Street. . . . I had to ask permission first to take a demonstration car out. After a car had been assigned to me by Mr. Etheredge or Mr. Stone for a demonstration car I never had to ask permission after that to take that car out of the place of business. I drove it when and where I pleased."

The evidence was to the effect that on Saturday night the defendant, Todd Grier, left the place of business of his codefendant, Etheredge, at closing time, taking the demonstration car with him to his home. On Sunday morning at about nine o'clock the defendant, Todd Grier, took said demonstration car to take his friend, Dewey Hampton, from Charlotte to his home at Taylorsville, about thirty miles beyond Statesville.

The defendant, Todd Grier, testified: "When I started out with Dewey Hampton that Sunday morning I did not have any idea at all of getting any liquor at Dewey's house. . . . I went to take Dewey home." In a short while after arriving at Hampton's home some whiskey appeared and the defendant, Todd Grier, began drinking freely and in addition purchased a quantity of whiskey to take back with him to Charlotte in the car. The defendant was very much under the influence of whiskey on his return trip and testified: "When I came to

Monday morning I was in my car. I had my tire repaired just before dark Sunday night. When I came to myself Monday morning and found myself in my car, I came on to Charlotte. . . . If I went to the place of business of Etheredge Motor Sales Co. after leaving the tire station I did not know it. When I got to the tire station I was drunk. . . . With reference to where I started after leaving that tire station, all I remember was coming out of the tire station, and where I went I don't know. . . . I have no recollection of striking that colored woman. . . . I did not sell any automobiles on the trip to Statesville. I did not take any orders. I did not try to get any orders. The territory within which I ordinarily solicit orders while I was working for Mr. Etheredge was in the city of Charlotte, Mecklenburg County. . . . I had no prospect in Statesville or Taylorsville or up in that locality."

The defendant further testified: "If I had run up on a man who wanted to buy a car I would have taken the order," and, further, "Nobody offered to buy. (Q.) But on the trip up before you got full of liquor, if somebody had offered to buy a car from you, you would have taken the order, wouldn't you? (A.) For Monday, yes, sir."

There was evidence tending to show that during the trip the defendant, Todd Grier, took the Etheredge Motor Sales Company tag off the car and placed another tag thereon. There was no evidence tending to show that Grier was an incompetent driver or that he had ever been drunk or under the influence of whiskey to the knowledge of his employer.

The codefendant, Etheredge, testified that he did not know that Grier was going to make the trip to Taylorsville, and would have objected if he had known it; and, further, that he did not know that his codefendant and employee drank prior to the killing of plaintiff's intestate.

The cause was submitted to a jury, and there was a verdict against both defendants.

The defendant, Etheredge, appealed, contending that he was not liable for the acts of his codefendant, Todd Grier, at the time of the killing of plaintiff's intestate.

Cansler & Cansler and Henderson & Meyer for plaintiff.
C. H. Gover for defendant.

BROGDEN, J. The question is this: Is an employer of an automobile salesman who furnishes the salesman a car for demonstration purposes and permits the salesman to keep the car at night, liable for the negligent acts of said salesman in operating said car?

The answer to this question depends upon whether or not the salesman, at the time of committing the negligent act, was acting within the "scope of his employment." One of the leading cases in this State on the question of "scope of employment" is *Sawyer v. R. R.*, 142 N. C., p. 1. *Justice Hoke,* quoting from Wood on Master and Servant, says: "The test of liability in all cases depends upon the question whether the injury was committed by the authority of the master, expressly conferred or fairly implied from the nature of the employment and the duties incident to it. The simple test is whether they were acts within the scope of his employment; not whether they were done while prosecuting the master's business, but whether they were done by the servant in furtherance thereof and were such as may fairly be said to have been authorized by him. By 'authorized' is not meant authority expressly conferred, but whether the act was such as was incident to the performance of the duties entrusted to him by the master, even though in opposition to his express and positive orders."

Again, in *Marlowe v. Bland,* 154 N. C., 140, it is said: "An act is within the scope of the servant's employment where necessary to accomplish the purpose of his employment, and intended for that purpose, although in excess of the powers actually conferred on the servant by the master. The purpose of the act rather than its method of performance is the test of the scope of employment. But the act cannot be said to be within the scope of the employment merely because done with intent to benefit or serve the master, not merely because the injuries complained of would not have been committed without the facilities afforded by the servant's relations to his master, nor because the servant supposed that he possessed authority to do the act in question."

Again, in *Dover v. Mfg. Co.*, 157 N. C., 324, it is said: "In an action for tort, in the nature of an action on the case, the master is not responsible if the wrong done by the servant is done without his authority and not for the purpose of executing his orders or doing his work. So that, if the servant wholly for a purpose of his own, disregarding the object for which he is employed, and not intending by his act to execute it, does an injury to another, not within the scope of his employment, the master is not liable." And again, in the same case, *Justice Brown* declares: "Beyond the scope of his employment the servant is as much a stranger to the master as any third person, and his act in that case cannot be regarded as the act of the master."

In *Bilyeu v. Beck,* 178 N. C., 481, a judgment of nonsuit was upheld, *Justice Allen* observing: "There is no evidence that the daughter was on any mission or performing any service for the defendant, her mother."

Under the decisions, therefore, an act, to fall within the "scope of employment":

1. Must be done in furtherance of the master's business or incident to the performance of the duties entrusted to the servant by the master.

2. Must be done in the prosecution of the master's business or in executing his orders or doing his work.

3. Must be connected with some mission or the performance of some service for the principal.

4. Where the act is necessary to accomplish the purpose of the employment and intended for that purpose.

The general principles of law governing such cases are well established. The chief difficulty encountered is in applying these general principles to the facts of particular cases.

In the case at bar the defendant, Todd Grier, as salesman, had wide discretion as to the use of the car with which the plaintiff's intestate was killed. But liability in such cases is not ordinarily imposed upon the employer, by reason of the extent of the authority of the agent, but rather upon the purpose of the act and whether it was done in the furtherance of the employer's business or was reasonably incident to the discharge of the duties entrusted to the employee.

Tested by the established principles of liability, is the defendant, Etheredge, liable for the negligent acts of the defendant, Grier, under the facts disclosed in this record?

The defendant, Grier, went to Taylorsville to carry a friend on Sunday morning. He began to drink heavily and became intoxicated. He purchased whiskey which he was taking back to Charlotte with him. Upon arriving in Charlotte, he did not return or attempt to return to the place of business of his employer, but was on his way home when in a drunken condition he negligently ran over and killed plaintiff's intestate. He did not solicit or attempt to solicit orders during the trip. He had no such purpose in mind. A trip on Sunday from Charlotte to Taylorsville to take a friend to his home was in nowise incident to the performance of his duties as a salesman, and the record does not disclose any act whatever in furtherance of the employer's business or intended for any such purpose, but, upon the other hand, the whole undertaking was one designed for the personal purposes of the agent.

The case of *Reich v. Cone,* 180 N. C., 267, is directly in point. In that case *Clark, C. J.,* says: "When a motor car is used by one to whom it is loaned for his own purpose, no liability attaches to the lender unless, possibly, when the lender knew that the borrower was incompetent, and that injury might occur." In our case, there was no evidence that the defendant, Etheredge, knew that Todd Grier was an incompetent driver or that he drank liquor.

The same principle is stated in Huddy on Automobiles, 7 ed., sec. 763: "One having possession of an automobile as an agent of the owner for the purpose of selling the same, has implied authority, unless forbidden, to run the machine to demonstrate it to a proposed purchaser. If guilty of negligence in so running it, the owner may be liable for injuries proximately resulting from such negligence. The agent, however, cannot use the car for his own private purposes, and his negligence when so using the machine cannot be chargeable to the owner."

In *Wright v. Motor Car Co.* (Utah), 177 Pac., 237, the general manager of the defendant took a demonstration car owned by the defendant and went with a friend to see a young lady to take her to a dance. The Court held that there was no liability imposed upon the owner of the car for the negligence of the operators for the reason that the car was being used for purely social purposes." To the same effect is *Slater v. Advance Thrasher Co.* (Minn.), 107 N. W., 133.

The plaintiff relies upon *Freeman v. Dalton,* 183 N. C., 538. In that case the agent was actually engaged in operating the car as an emergency car for carrying passengers. The original record discloses that there was testimony to the effect that the defendant, Dalton, employed the agent to drive the jitney and paid him for his services. So that there was evidence that the defendant was the owner of the car and that it was being operated for business purposes.

Upon a careful perusal of the record and an examination of the authorities, we are of the opinion, and so hold, that the motion of nonsuit made by the defendant, Etheredge, at the conclusion of all the evidence, should have been allowed.

Reversed.

J. M. ROBERTSON ET AL. v. BOARD OF EDUCATION OF YANCEY COUNTY ET AL.

(Filed 15 December, 1926.)

Taxation—Schools—Purchase of Lands—Bonds.

Without legislative authority, a board of education of a county may not purchase additional land for school purposes, or the county commissioners issue bonds for the purpose, and an injunction will lie against their doing so.

APPEAL by plaintiffs from *Johnson, Emergency Judge,* at Chambers, 6 September, 1926. From YANCEY. Reversed.

Action for permanent injunction, restraining defendants from incurring an indebtedness of $30,000, for the payment of the purchase price

of certain land to be used for school purposes. From judgment dissolving a temporary restraining order theretofore issued, plaintiff appealed to the Supreme Court.

R. W. Wilson and A. Hall Johnston for plaintiff.
No counsel for defendant.

PER CURIAM. At the commencement of this action, defendant board of education of Yancey County, was negotiating for the purchase of certain land in said county, to be used for school purposes. It proposed to incur an indebtedness of $30,000 for the purchase of said land, and to request the board of county commissioners to issue bonds of Yancey County in said sum, to raise money to pay the purchase price for said land. It is conceded that there is no legislative authority for the board of education to purchase said land, or for the board of county commissioners to issue said bonds. It was, therefore, error to dissolve the temporary restraining order theretofore issued by Judge Stack. *Tate v. Board of Education of McDowell County, ante,* 516. Chapter 120, Public Laws 1924, Extra Session, does not apply to Yancey County. It is not contended, however, that the purchase of said land is required to enable the board of education of Yancey County to maintain public schools, as required by the Constitution, in said county.

Whether it is a wise policy for the board of education to purchase this land, for the reasons it assigns in its answer to the complaint, does not present a question of law for our decision; we decide, only, that neither the board of education nor the board of county commissioners has the power, without legislative authority conferred by statute, either general or special, to contract an indebtedness for the purchase of land for school purposes.

The judgment must be
Reversed.

STATE v. TOM R. PIERCE.

(Filed 31 December, 1926.)

1. Intoxicating Liquor—Spirituous Liquor—Evidence—Nonsuit—Motions.

Evidence in this case tending to show that the defendant lived in a part of his filling station used as a residence, where was found a quantity of empty bottles smelling of whiskey, and that in the vicinity was a used roadway leading to several places where cartons with bottles of whiskey were concealed, etc.: *Held,* sufficient to deny defendant's motion as of nonsuit. 3 C. S., 3411(b), (j).

2. Evidence—Nonsuit—Criminal Law.

Upon a motion as of nonsuit upon the evidence in a criminal case, the evidence is to be taken in the light most favorable to the State, with all reasonable inferences therefrom resolved in its favor.

3. Intoxicating Liquor—Spirituous Liquor—Prima Facie Case—Evidence—Constructive Possession.

A prima facie case of the unlawful sale of intoxicating liquors may be established by circumstances sufficient to show that the defendant had in his constructive possession large quantities of whiskey not on his premises, in the possession of others who held it for him.

4. Instructions—Criminal Law—Burden of Proof—Charge Construed as a Whole.

An instruction in a criminal case will not be held for prejudicial or reversible error for failing in one part of the charge to place the burden of proof on the State to show guilt beyond a reasonable doubt, when in the same connection, and by another portion of the charge, this requirement is clearly given.

5. Instructions—Words and Phrases.

The use of the words "proven by the testimony" for the words "warranted by the testimony," is not subject to just criticism by the defendant in a criminal case, when used in the charge by the judge to the jury in relation to the degree of proof required of the State to convict.

APPEAL from *Cranmer, J.*, and a jury, at August Term, 1926, of WAYNE. No error.

The defendant was indicted for having in his possession, on or about 19 June, 1926, about sixty pints of whiskey for the purpose of sale. The defendant operated a filling station on the Raleigh hard-surfaced highway, No. 10, about a mile from the city limits of Goldsboro. From information received, L. O. Rhodes, deputy sheriff of Wayne County, obtained under the law a search warrant. He, with the sheriff's son, went to Pierce's premises to search, and informed him of the warrant. The search was made. (1) Rhodes found in the store a pint bottle with half teaspoon of liquor in it; (2) under the store, where defendant kept his car, he found a box containing fifteen or twenty empty pint bottles sitting on the running board of defendant's car, similar to the one found in the store; (3) he saw tracks leading from the filling station, which he followed to a ditch, and there found a Big Boy carton with cells in it that hold the bottles apart. "One had a tiny bit of liquor, a pint bottle just like the other one I found." That was seventy (66) feet from the corner post of the filling station. He followed the ditch on down directly back of the store and (a) found another paste-board carton in a sack with no bottles in it, but three jug stoppers in it. Same kind of carton found at the other place. Robuck

(W. P. Grant), who was with him, called "Come over here; here it is," and he found (b) two cases, one full and a part of a case, same as other pasteboard carton with letters on the side of it. One full case of whiskey, twenty-four pints, and the other six or seven pints had been taken out; (c) another case in a sack, same kind. (d) Then another carton practically full of whiskey, a hole torn in the top, same kind of bottles. He kept going a little further until six cartons on that side, and he had two, making eight—in all sixty-five pints. Defendant was with him during the search.

Rhodes testified further: "When I started to the first place where I found the carton, I said, 'All these bottles look bad,' and he (defendant) said, 'I can't help that, people come here and drink whiskey and throw the bottles over the fence, and I can't help it.' They were scattered between the filling station and the ditch; emptied and thrown out there. I don't know how many we found scattered; I reckon some ten or twelve were out there." The search was made about 4 o'clock Saturday evening.

W. P. Grant, a deputy sheriff, testified in part: "I went under the store. I first lifted up a bundle of broom straw and found a case of empty bottles. I set them on the running board of Tom Pierce's car. These bottles had the odor of whiskey in them. The bottles were all pint bottles, twenty-four to the case." He corroborated Rhodes in other particulars.

The distance from the store to the place Rhodes found the carton was twenty-two yards and about fifty-one yards to where the first case of other liquor was found. A path leading to each place and the whiskey was under some briars at ends of the paths. The liquor found was across the road from the filling station. Defendant used the back of the store or filling station as a residence.

H. L. Bizzell testified in part: The last part of May, about 7 or 8 o'clock in the morning, before the search in June, "I was coming from towards Kenly into the highway No. 10, and in just about a hundred or a hundred and fifty yards of his place I saw a man handing Pierce jugs, and he was putting them in sacks, and I thought to myself it never would do to run right up on them, and I blew my horn good and loud, and they done just like a worm in hot ashes; they just went all down over it. . . . He went over the sack and down to the ground, both men did, and I was going on No. 10, and a car was coming, and I couldn't look to see what they did, but that was what happened. I did not recognize the other man, but Pierce was standing in front taking the jug and putting it into the tow-bag. There was only one man handing those jugs to Tom Pierce. I saw him hand Pierce the third jug. That

man was driving a Ford automobile; it looked like he got the jug from the back of the car. This car came up to the filling station from the same way I did, and was very near the door—about six or eight feet from the door."

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

J. Faison Thomson, Outlaw & Dortch and Murray Allen for defendant.

CLARKSON, J. The defendant introduced no evidence, but at the close of the State's evidence moved for judgment of nonsuit. C. S., 4643. The court below overruled the motion. In this we think there was no error. On a motion to nonsuit, the evidence is to be taken in the light most favorable to the State, and it is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom. We think there was more than a scintilla of evidence, and the evidence, both direct and circumstantial, amply sufficient to be submitted to the jury. *S. v. Sigmon*, 190 N. C., p. 684.

In *S. v. Meyers*, 190 N. C., p. 239, *Varser, J.*, writing for the Court, citing many authorities, says: "Possession usually implies detention or control, or the right thereto. The possession may be in one person for another, or in one for several, or in several for another, or for themselves, and others not actually present, or however distant from the whiskey itself. Possession is the retention or enjoyment of a thing which a man holds or exercises by himself or by another who keeps or exercises it in his name. . . . The possession may, within this statute, be either actual, or constructive. . . . If a man procures another to obtain liquor for him and put it in a given place, and the other performs this agreement and places the liquor, then the possession is complete. A person may be in the possession of the article which he has not at the moment about his person. The Turlington Act 'shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.' There the constructive possession, as well as the actual possession, is in the contemplation of the statute."

Public Laws 1923, chapter 1, known as the Conformity or Turlington Act, sec. 2, 3 C. S., 3411(b), says: "No person shall manufacture sell, barter, transport, import, export, deliver, furnish, purchase, or possess any intoxicating liquor except as authorized in this act; and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented," etc. Section 10, 3 C. S., 3411(j), is as follows: "The possession of liquor

by any person not legally permitted under this act to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this act. But it shall not be unlawful to possess liquor in one's private dwelling while the same is occupied and used by him as his dwelling only, provided such liquor is for use only for the personal consumption of the owner thereof, and his family residing in such dwelling, and for his bona fide guests when entertained by him therein."

The defendant occupied and used the rear of the filling station as his private dwelling. The court below, on this aspect, charged the jury as follows: "Prima facie evidence means that evidence which is received and accepted and continued until the contrary is shown, and you gentlemen of the jury will remember the evidence, giving the State of North Carolina a fair and an impartial trial, and giving the defendant at bar a fair and an impartial trial." This instruction, standing alone, may be subject to some criticism *(S. v. Wilkerson,* 164 N. C., p. 431), but in this immediate connection the judge charged the jury as follows: "Now the State has the duty of satisfying you beyond a reasonable doubt of the guilt of the defendant. A reasonable doubt is an honest, substantial misgiving generated by insufficient proof, insufficiency which fails to satisfy your reason of the guilt of the accused. A reasonable doubt is not a doubt suggested by ingenuity of counsel or by your own ingenuity not legitimately proven by the testimony. It is not a doubt to permit the defendant to escape the penalty of the law. It is not a possible doubt, an imaginary doubt or a captious doubt, but it is a fair doubt, based upon reason and common sense and growing out of the evidence in the case." Taking the instruction in its entirety, we think it should be upheld. *McDaniel v. R. R.,* 190 N. C., at p. 475.

If he had possession of liquor as disclosed by this record it was prima facie evidence that he had it for sale. If not in his private dwelling, if he had actual constructive possession, whether for sale or not, it is a violation of law. 3 C. S., 3411(b) (j); *S. v. McAllister,* 187 N. C., 400; *S. v. Knight,* 188 N. C., 630.

It will be noted that section 10 has reference to the liquor *"in one's private dwelling while the same is occupied and used by him as his dwelling only."* Defendant cannot complain of the charge. There was sufficient direct and circumstantial evidence to be submitted to the jury, taking into consideration the testimony of Bizzell, that defendant had possession of liquor—not in his private dwelling. *S. v. Bradsher,* 188 N. C., 447; *S. v. Sigmon, supra.*

The charge of reasonable doubt is substantially that approved in *S. v. Steele,* 190 N. C., at p. 512. See *S. v. Sigmon, supra.* The use of

"proven by the testimony" for the words "warranted by the testimony," is a distinction without a difference, to warrant the testimony there must be proof. Leaving out the words "born of a merciful inclination or disposition" seems to be more favorable to the defendant. It emphasizes that when warranted by proof merciful inclination or disposition should not supplant law.

On the entire record we can find no prejudicial or reversible error.

No error.

WOLF MOUNTAIN LUMBER COMPANY v. M. BUCHANAN, GEORGE H. SMATHERS, AND THE AMERICAN NATIONAL BANK.

(Filed 31 December, 1926.)

1. **Equity—Cancellation—Bills and Notes—Consideration—Negotiable Instruments—Statutes.**

   The endorser of a note may resort to the equity jurisdiction of our courts which is preventive of injustice as well as remedial, to cancel a negotiable instrument in the hands of his immediate endorsee for a total failure of consideration, and under our statute, C. S., 2982, this remedy is available whether the misrepresentation of value was innocently or knowingly made.

2. **Negotiable Instruments—Holder by Endorsement—Discharge of Endorser's Liability.**

   Where the holder of a negotiable instrument by endorsement has acknowledged in his action that he had acquired the instrument from his immediate endorser without a consideration, and that it was delivered to him after maturity with knowledge of the infirmity of the instrument, he may not successfully defend in the suit of the maker to have the note canceled, upon the ground that he is a holder by endorsement for value.

3. **Same—Endorsee's Releasing Maker From Liability.**

   Where the holder of a negotiable instrument releases the maker from liability thereon, he thereby discharges from liability his endorser from whom he acquired the instrument, C. S., 3102. The question as to whether the former relinquished his right of recourse against his immediate endorser under the facts of this case is not presented or decided, but discussed by *Adams, J.*

4. **Same—Liability of Subsequent Endorsers—Right Expressly Retained—Statutes.**

   Where the holder by endorsement has discharged subsequent endorsers therein by releasing the maker from liability thereon, he may not hold his immediate endorser without having first obtained his consent or reserved the right of recourse against him. C. S., 3102.

5. Deeds and Conveyances—Warranty—Eviction.

In order to hold the grantor in a deed liable upon his warranty therein, it must be shown by the grantee that his possession thereunder had been disturbed by eviction, etc.

APPEAL by the defendant, Smathers, from *McElroy, J.*, at February Term, 1926, of BUNCOMBE. No error.

The action was brought to cancel and to recover the possession of a note executed by the plaintiff to the defendant, Buchanan, for $719.30, and by him endorsed to Smathers, his codefendant. The note dated 10 May, 1913, and payable 10 May, 1923, together with other notes was secured by a deed of trust.

On 5 April, 1918, Buchanan assigned the note for $719.30 to Smathers, and in writing requested the American National Bank to deliver to him this and four other notes then held by it in escrow. Two issues were submitted and answered:

1. Did the defendant, M. Buchanan, assign the note for $710.30 to his codefendant, George H. Smathers, for full value, as alleged in the answer? Answer: Yes.

2. Is the defendant, M. Buchanan, indebted to his codefendant, George H. Smathers, for the principal of said note of $719.30, with interest thereon from 1 January, 1918, computed semiannually? Answer: No.

Upon the pleadings there was judgment for the plaintiff and upon the verdict judgment was rendered against the defendant, Smathers, and he excepted and appealed.

Merrimon, Adams & Adams for plaintiff.
Kenneth Smathers and Chas. E. Jones for defendant, Smathers.
Mark W. Brown for defendant, Buchanan.

ADAMS, J. There is no exception to the evidence or to the issues submitted or to the refusal to submit those tendered or to any instructions given the jury except the directed instruction as to the second issue which involves a question of law. The appeal presents this exception and an exception to the final judgment. Whether either can avail the appellant is the question for decision.

The defendant Buchanan owned an undivided interest of 5/24 in the tracts of land described in six grants issued to J. T. Foster and the defendant Smathers an undivided interest of 5/24 in the same land. In addition to some other adjoining land Smathers owned the Dunn, the Broom, and the Moore tracts, each of which lapped on one or more of the grants. On 10 May, 1913, Buchanan and his wife executed and delivered to the plaintiff their deed conveying certain land in the

counties of Jackson and Transylvania for the recited consideration of $9,028.62. The plaintiff made a cash payment of $1,805.72 and executed eight notes for the deferred payments, securing them by a deed of trust. Thereafter on 27 July, 1914, upon objection raised to Buchanan's title he and the plaintiff entered into a written agreement providing that the American National Bank should hold five of the notes, and upon the plaintiff's order should deliver them to Buchanan as from time to time the defects in his title were cured. One of these notes was in the sum of $719.30 and, as contended by the plaintiff, was given for Buchanan's alleged interest in the Dunn, Broom, and Moore tracts, but on 3 July, 1916, the defendants Smathers and Buchanan agreed in writing that Smathers was the sole owner of this land, and that Buchanan had no interest therein; and thereupon in a written communication of the same date they authorized the plaintiff to settle with them on the terms of the agreement. Smathers and Buchanan made a settlement of all matters between them affecting certain real estate and the Brevard Land and Lumber Company on 1 April, 1918, and four days afterwards as a part of the settlement Buchanan assigned to Smathers and endorsed the five notes above referred to and sent to the bank and to the plaintiff a written request to deliver them to the assignee. Smathers testified that Buchanan at the time he endorsed the notes denied that the consideration of the note for $719.30 was Buchanan's interest in the Dunn, Broom, and Moore tracts, but asserted that it was his interest in other land. After they were endorsed the notes were left in the bank under the agreement and were not delivered to Smathers until 11 May, 1923, the day after they matured.

Finding it difficult to collect the note for $719.30 the defendant Smathers according to his own testimony volunteered, if the plaintiff would bring suit against Buchanan and himself, to prepare the complaint. Accordingly process was issued and he drafted the complaint, which contained in substance the following material allegations: the defendant Smathers was the owner of the Dunn, Broom, and Moore tracts of land, but Buchanan claimed an interest therein; the price to be paid Buchanan was at the rate of $12 an acre, and the value of his interest, including his claim in the Dunn, Broom and Moore tracts was $9,028.62; before the transaction was closed it was found that Smathers was the exclusive owner of these tracts, although Buchanan insisted that he had an interest in them; the plaintiff and Buchanan then agreed that the five notes previously described should be deposited in the bank to be held in escrow until the controversy was adjusted; the note of $719.30 represented and was executed for the sole purpose of covering the interest claimed by Buchanan in the Dunn, Broom and Moore land;

Buchanan afterwards admitted that he owned no interest in these tracts and represented to Smathers that it was given for other interests; the plaintiff has often demanded of Buchanan and the bank the return to it of the note in question for cancellation pursuant to the agreement and Smathers has demanded that the note be paid him; Buchanan, without regard to the note, is liable to the plaintiff for breach of warranty in an amount equal to the value of the note. The relief demanded is the return of the note for cancellation.

The defendant Smathers prepared and filed his answer in which he admitted all the allegations in the complaint, and set up matters as a basis of relief against Buchanan. Upon these admissions the plaintiff, as against the payee, was entitled to a cancellation of the note. If the payee had instituted an action at law to enforce collection the maker could have defeated payment by showing a total failure of consideration. *Washburn v. Picot,* 14 N. C., 390; *Johnston v. Smith,* 86 N. C., 498; *Womelsdorf v. O'Connor,* 44 S. E. (W. Va.), 191. This, however, is a suit in equity. Cancellation is a subject of equitable jurisdiction; and in accordance with the principle that a transaction may be rescinded though not fraudulent or illegal, a contract may be set aside if made for a consideration which is really nonexistent. Adam's Eq. (7 Am. Ed.), 188. Equity jurisprudence is not merely remediable; it is preventive of injustice. 2 Story's Eq. Jurisprudence, 10. Therefore an instrument if void may be canceled; and by a stronger reason may this be done if the instrument is evidence of a voidable transaction, and above all if it is of a negotiable character. Bispham's Prin. Eq., sec. 473. In this case the subject of the controversy is a negotiable instrument (C. S., 2982), the cancellation of which is sought on the admitted ground that it is not supported by a valuable consideration; and in such case the effect is the same whether the payee's representation of value was innocently or knowingly made.

But Smathers contends that as he is the holder of the note by endorsement he is entitled to relief against Buchanan, and that as affecting himself the judgment directing cancellation of the note is erroneous; on the other hand Buchanan insists that his liability as endorser was secondary, and that the holder's admissions released both the obligor and the endorser. The answer to the first issue was given by consent of Buchanan and the answer to the second was entered by direction of the judge upon the undisputed evidence. Smathers admitted not only that the note was without consideration, but that it had been delivered to him after maturity, and with knowledge of all the facts he prepared the complaint demanding that the note be canceled and drafted his answer thereto admitting in effect that the plaintiff was entitled to this relief.

It is provided by statute that a person secondarily liable on a negotiable instrument is discharged by any act which releases the principal debtor unless the holder's right of recourse against the party secondarily liable is expressly reserved. C. S., 3102. At common law if the holder of a negotiable instrument released the maker without the endorser's consent he thereby discharged the endorser from all liability, the reason being that the holder in this way impliedly stipulated not to pursue the endorser. *Bank v. Bennett,* 214 Mass., 352. The Uniform Negotiable Instruments Law has enlarged the scope of the doctrine so that in general terms it may be said that the holder's release of the maker will discharge all subsequent parties unless they consent or unless the holder's rights are expressly reserved. 8 C. J., 616, sec. 856.

It is important to keep in mind the plaintiff's prayer for relief against all the defendants, Smathers, Buchanan, and the bank, namely, cancellation of the note and return of the interest paid. The plaintiff admitted that its cause of action as to the interest was barred by the statute of limitations; and when Smathers in the complaint prayed for the surrender and cancellation of the note and in his answer admitted that the plaintiff was entitled to this relief, he released the maker and did not reserve a right to enforce against Buchanan any alleged liability arising out of his endorsement of the note. He made no such allegation. In his further answer he alleged that at the time he took an assignment of the five notes Buchanan insisted that the note for $719.30 did not represent the value of his interest in the Dunn, Broom and Moore tracts, but he did not allege that the note was not given for the 5/24 interest. Indeed, it was alleged in the complaint and admitted by Smathers that the note did represent this specific interest. He contends that if the note was given for this interest he is entitled to recover against Buchanan the face of the note and the interest he refunded to the plaintiff; but this cannot be. He is not entitled to the interest refunded because he received it with an agreement to refund if the condition which he admitted was found to exist; he is not entitled to recover the face of the note against Buchanan because he released the principal debtor without expressly reserving his right of recourse against Buchanan, who was secondarily liable as endorser. His allegations as set forth in the second paragraph of his further defense are statements of contentions based upon one or two hypothetical adjudications, but they do not make a reserved cause of action against the endorser. It is apparent upon the allegations that the decision in *Bank v. Crafton,* 181 N. C., 404, is not controlling in this controversy. Moreover, it may be questioned whether the admissions of Smathers are not equivalent to a discharge of the note which under the terms of the statute would also discharge the endorser. C. S., 3102.

It is also contended that Buchanan's relation to Smathers is contractual and governed by the principles generally relating to a warranty of commercial paper. As to whether Smathers has a cause of action against Buchanan on this theory we express no opinion at this time; but as the appeal is presented we cannot say that the negotiable instruments law is not applicable.

The contention that Buchanan is liable to Smathers for a breach of warranty in Buchanan's deed to the plaintiff is not supported either by the pleadings or by any exception in the record; but if this cause had been alleged it could not have availed the plaintiff unless there had been eviction or disturbance of possession, and *a fortiori* it could not avail Smathers. *Cover v. McAden,* 183 N. C., 641; *Lockhart v. Parker,* 189 N. C., 138. We find

No error.

CITY OF WINSTON-SALEM v. C. F. COBLE ET AL.

(Filed 31 December, 1926.)

Municipal Corporations — Cities and Towns — Street Improvements— Statutes—Assessments—Petition of Property Owners.

Where the abutting owners along a street of a city proposed to be widened by a municipality are to pay more than 50 per cent of its costs, the petition required by the statute to be filed with the municipality must show that it was signed by a majority of the owners along the street, including those who have a beneficial interest and each tenant in common when any of the lots are held in common, and the majority of such persons must own a majority of the frontage of the lots along the street. Chapter 107, Public Laws, extra session, 1924, amending chapter 220, Public Laws of 1923. 3 C. S., 2792(a), (b); C. S., 2707.

APPEAL by defendants from *Oglesby, J.*, at September Term, 1926, of FORSYTH. Dismissed.

The material facts will be set forth in the opinion.

Parish & Deal for plaintiff.

Hastings & Booe, J. E. Alexander, L. M. Butler and Moses Shapiro for defendants.

CLARKSON, J. The city of Winston-Salem instituted this action in the Superior Court of Forsyth County for the purpose of widening North Liberty Street in said city a distance of about two blocks by adding about ten feet to its present width. The proceeding, it is alleged,

was instituted under 3 C. S., 2792 (a) (b), etc. (chapter 220 of the Public Laws of 1923, as amended by chapter 107, Public Laws, extra session, 1924). It was a requirement to the city's right to make such improvement and assessment that a petition complying with the provisions of the amendments of 1924 (chapter 107, Public Laws, extra session, 1924) be signed by the requisite number of property owners. The petition of the plaintiff sets out the names of the alleged owners and others having interests in the twelve tracts of land included in the assessment district, and also the names of the persons who signed as the property owners for the improvement.

It is also alleged that there are twelve lots or parcels of land in the assessment district, considering the person who has the beneficial legal title and not considering as owners persons who have other interests in the lands, such as trustees under deeds of trust, beneficiaries under deeds of trust, or wife of the real owner. It is alleged that the owners of eight of the twelve lots signed the petition, and that the lots for which such owners signed have a total frontage of 911.25 feet, and the other lots in the district for which the owners have not signed a frontage of 534.60 feet. The persons who are owners of lots Nos. 4 and 10 are beneficiaries under the will of A. L. Stevenson and are 18 in number.

The demurrers filed by the defendants state that the petition does not state facts sufficient to constitute a cause of action, for the reason that a majority of the heirs of A. L. Stevenson have not signed it and it does not comply in other respects, etc., and therefore insufficient under C. S., 2707. That section, in part, is as follows: "The petition for a local improvement shall be signed by at least a majority in number of the owners, who must represent at least a majority of all the lineal feet of frontage of the lands (a majority in interest of owners of undivided interests in any piece of property to be deemed and treated as one person for the purpose of the petition) abutting upon the street or streets or part of a street or streets proposed to be improved," etc.

The defendants further demur *ore tenus* or move to dismiss in this Court. *Snipes v. Monds,* 190 N. C., 190. In substance:

First, because the words "Majority in number of the property owners," as used in the amendment to chapter 220, Public Laws 1923, include not only the persons having the beneficial legal title, but also trustees under deeds of trust, beneficiaries under deeds of trust, wives of the owners, all other persons having interests therein and therefore the property owners' petition being signed by only eight persons is insufficient.

Second, because the words "majority in number of the property owners," as used in said amendment, require that owners of undivided interests be counted separately and not as a group.

Public Laws of N. C., extra session, 1924, ch. 107, is as follows:

"SECTION 1. That chapter two hundred and twenty of the Public Laws of one thousand nine hundred and twenty-three be amended by adding after section two the following: '*Provided, however,* that no district shall be declared as an assessment district by the governing body of any municipality, where the purpose of the proposed improvements contemplated the opening of a new or the widening of an existing street and the destruction or removal of buildings abutting thereon, and where *as much or more than fifty per cent of the costs of such proposed improvement* is to be charged against the property within such district, unless and until a petition therefor *signed by at least a majority in number of the property owners, which must represent at least a majority of the street frontage* to be assessed within said district, shall be filed with the governing body of such municipality.' "

It will be noted that this amendment is to chapter 220, Public Laws 1923, adding it after section 2. The procedure under chapter 220, Public Laws 1923:

Section 3 is in part as follows: "Whenever a final order shall be made by such governing body creating such assessment district and directing the laying out, opening, extending, altering, straightening or widening any street or alley," etc., . . . "the governing body of such municipality *shall file with the clerk of the Superior Court its petition,*" etc.

SEC. 4. That upon the filing of said petition *the clerk of the Superior Court* shall issue a summons to the parties interested in the lands, . . . The said proceedings shall be conducted in all respects as are other special proceedings, and the clerk may issue process and make publication for parties and appoint guardians in like manner as is provided by law in the case of special proceedings."

SEC. 5. *The clerk of the Superior Court shall hear the proofs* and allegations of the parties, and if no sufficient cause is shown against granting the prayer of the petition, he shall make an order appointing three disinterested competent freeholders of the county as such commissioners," etc.

Section 9 makes provision for exception to report of commissioners and appeal to Superior Court, and then to Supreme Court.

As the point is not raised as to proceedings before the clerk in the first instance, we will not consider it.

The resolution of the board of aldermen states: "That not exceeding 25 per cent of the total cost of said improvement shall be chargeable against the city of Winston-Salem at large."

The controversy comes within chapter 107, Public Laws 1924, extra session, amendment to chapter 220, Public Laws 1923, as more than 50 per cent of the costs of such improvement is to be charged against the property in the district.

The material bone of contention between the parties, and the only one we will consider, relates to the construction of the above amendment: *"Unless and until a petition therefor signed by at least a majority in number of the property owners which must represent at least a majority of the street frontage to be assessed within said district,"* etc.

The facts in reference to the contention: The petition alleges that the total feet frontage is 1445.85; that there are twelve lots or parcels of land; that those who hold the beneficial legal title, that is not considering as owners persons who have other interests in the land such as trustees under deeds of trust, beneficiaries under deeds of trust or wives of real owners. That eight of those who have the beneficial legal title have signed, and they have a total frontage of 911.25 feet, and the others who have not signed have a total frontage of 534.60 feet.

The record shows that the other four who hold the beneficial legal title—one is A. L. Stevenson's estate that owns 260.80 feet frontage, lots 4 and 10, and his devisees are eighteen in number, owners of undivided interests—one of the number, Mrs. J. J. Mock, it is alleged, signed the petition. It is contended by defendants, taking those who hold the beneficial legal title and others, including wives, trustees, beneficiaries or *cestui que trustents* there are fifty-one and more.

Plaintiff puts the construction on the amendment as follows: "It will be noted that the amendment provides that no such improvement shall be made 'unless and until a petition therefor signed by at least a majority in number of the *property owners which must represent at least a majority of the street frontage* to be assessed within said district shall be filed with the governing body of such municipality. By modifying the words 'property owners' with the clause, 'which must represent at least a majority of the street frontage to be assessed,' it will be seen that the Legislature had in mind not simply a majority of the property owners within the district, but a majority of the property owners in the district as such majority relates to the quantity of the land in the district owned by them."

The plaintiff in its brief says: The question "whether or not the group of persons who own lots 4 and 10 should be counted as a group or as individual owners? If they are to be counted as eighteen separate owners, then the petition of the property owners had not been signed by a majority. If they are to be counted as a group, then the petition was signed by a majority." We think they should be signed as separate owners.

It will be noted that the amendment of 1924 is restrictive. Where the property owner has to pay over 50 per cent of the cost then the municipality as a condition precedent must obtain at least a majority in number of the property owners, and this majority of property owners

must have a majority of street frontage. It is thus written, we interpret, and not make the law. The language we think is clear. It may be a hardship on the others who want the street improvements, but this is for the Legislature, not the Court. The eighteen persons interested in the A. L. Stevenson estate are property owners, although their holdings are small, they come within the language of the statute. The question raised as to wives, trustees, etc., should sign, it is unnecessary to pass on.

C. S., 456, in part, is as follows: "Any person claiming title or right of possession to real estate may be made party plaintiff or defendant, as the case requires, to such action."

For plaintiff ultimately to get a good title it would be necessary to have all interested parties before the court. Latter part of section 3, ch. 220, Public Laws 1923, is as follows: "And such petition shall state the names and addresses of the owner or owners who have any interest in the lands therein which may be affected by the said condemnation or the said assessment of benefits, and whether any of the said owners are minors or without guardians." *Jones v. Williams,* 155 N. C., 179; *Barrett v. Barnes,* 186 N. C., 158; *Trust Co. v. Powell,* 189 N. C., 372.

For the reasons given, the motion to dismiss is allowed.

Dismissed.

STATE v. JAMES P. PACE AND JOHN NELSON.

(Filed 31 December, 1926.)

1. **Escape—Evidence — Appearance Bond — Fraudulent Representation to Jailer—Deceit—Nonsuit.**

A conviction cannot be had for assisting a prisoner to escape from jail where he was lawfully confined upon evidence only tending to show that the defendants were sureties on the prisoner's bond for his appearance before the Superior Court for trial, and his release was obtained by the defendants' falsely representing to the jailer that the clerk had requested them to instruct the jailer to release the prisoner, and that the bond they had signed and then presented had been accepted by the clerk, and the prisoner then was called and discharged from custody after he had signed the bond as principal, without knowledge of the deceit practiced upon the jailer. C. S., 4643.

2. **Indictment—County Courts—Appeal—Grand Jury.**

Where there is a conviction of a misdemeanor in a county court having jurisdiction under a sufficient indictment, it is not necessary for another indictment to be submitted to the grand jury in the Superior Court on appeal.

STATE *v.* PACE.

APPEAL by defendants from *Harding, J.*, at August Term, 1926, of CHEROKEE. Reversed.

Defendants were convicted upon a charge that they had assisted a prisoner lawfully confined in the common jail of Cherokee County to escape therefrom. From judgment upon said conviction, defendants appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

R. L. Phillips for defendants.

CONNOR, J. Gudger Cothran was convicted of a crime in the general county court of Cherokee County. From judgment therein rendered, he appealed to the Superior Court. Pending the hearing of his appeal, he was duly committed to the common jail of Cherokee County, to be discharged, however, upon his giving a justified bond in the sum of $1,000, conditioned for his appearance at the next term thereafter of the Superior Court of said county. On 10 December, 1925, said Cothran, having failed to give said bond, was lawfully confined in said jail, under the commitment of the county court.

On said day Mrs. B. B. Morrow, wife of the sheriff of Cherokee County, was in charge of the jail and of the prisoners confined therein. Mrs. Cothran, wife of the prisoner, and defendants, James P. Pace and John Nelson, went to the jail where Mrs. Cothran, in the presence of defendants, presented to Mrs. Morrow a bond, which was in form and in the amount required by the order of the county court for the discharge of the prisoner, Gudger Cothran. This bond had been executed by defendants as sureties; they had justified before the clerk of the court. Mrs. Cothran and defendant Pace, in the hearing of defendant Nelson, told Mrs. Morrow that it was a good bond; that the clerk of the court had said that it was a good bond, and had directed them to tell her to release the prisoner. They told her that the clerk was busy in court, and could not come to the jail. Defendant Nelson made no statement in regard to the bond, except that he had justified for $300, and was good for that amount. Mrs. Morrow relied upon these statements, accepted the bond, and discharged the prisoner, who thereafter failed to appear at the next or at any succeeding term of the Superior Court of Cherokee County, in compliance with the conditions of said bond. A judgment *ni si* has been taken by the State upon this bond against Gudger Cothran, as principal and against defendants herein as sureties. Gudger Cothran has fled the State, and defendants have been unable to apprehend him, although they have made diligent efforts to do so.

The clerk of the court testified that defendant signed the appearance bond as sureties for Gudger Cothran, in his presence; that they justi-

fied before him; that he did not tell them or either of them to tell Mrs. Morrow to discharge the prisoner upon the filing of the bond with her; that he had no authority to take an appearance bond, unless expressly directed by the court to do so; that he seldom took a bond.

The sheriff testified that defendants, James P. Pace and John Nelson, on 10 December, 1925, presented to him a bond similar to the bond upon which the prisoner, Gudger Cothran, was released from custody; that he could not say that it was the same bond; that it was a bond for the release of Gudger Cothran, and that he "turned it down," because he did not consider it a good bond. The sheriff thereafter left his office, went out into the county on official business, and did not return until after the prisoner had been discharged. The deputy sheriff testified that he told defendants, prior to the discharge of the prisoner, that he would not take a bond signed by them as sureties.

Defendant John Nelson testified that he and defendant Pace signed the bond in the presence of the clerk, who thereupon gave the bond to Mrs. Cothran; that he had refused to become surety on the bond, or to justify until he had been indemnified by a mortgage; that Mrs. Cothran agreed to "make him safe"; that he went to the jail with Mrs. Cothran to see that the mortgage, which was prepared by an attorney, was executed. He heard Mrs. Cothran tell Mrs. Morrow that the bond was good. He told Mrs. Morrow that he had signed the bond for $300, and that he was good for that amount; that at the time he signed the bond, he owned land which was worth more than $1,800.

Defendant James P. Pace testified that after he and defendant Nelson had signed the bond in the presence of the clerk of the court, it was delivered to Mrs. Cothran by the clerk, and that she went at once to the jail where her husband was confined; that he went with her for the purpose of seeing another prisoner in the jail. He heard Mrs. Cothran tell Mrs. Morrow that it was a good bond, and that the clerk had said for her to discharge the prisoner. Mrs. Morrow said, "Yes, I see the name of the clerk on the bond." She then called to Cothran to come down. He came down, and she discharged him from custody. Witness testified that he and defendant Nelson signed the bond for $1,000, upon which the prisoner Cothran was discharged from jail; that he justified for $700, and defendant Nelson for $300. Witness had previously, on same day, signed a bond, as surety for Cothran, in the sum of $1,000; defendant Nelson did not sign that bond. That was the bond which the sheriff and deputy sheriff had declined to accept; neither of them had declined to accept the bond signed by both the defendants, and justified before the clerk. It was not presented to either the sheriff or the deputy sheriff. It was delivered by the clerk to Mrs. Cothran, who gave it to Mrs. Morrow, the jailer.

At the close of all the evidence, defendants renewed their motion for judgment as of nonsuit, first made and overruled at the close of the evidence for the State. C. S., 4643. The motion was again overruled and defendants excepted. Upon their appeal to this Court, defendants rely chiefly upon their assignment of error based upon this exception.

Defendants were first tried in the general county court of Cherokee County, upon a warrant issued by the judge of said court, pursuant to an affidavit attached thereto. They were convicted at said trial, and appealed from the judgment of the county court to the Superior Court. They were tried in the Superior Court upon the warrant issued by the judge of the county court; there was no indictment in the Superior Court; the crime charged is a misdemeanor, and within the jurisdiction of the county court. It was therefore properly tried in the Superior Court upon the warrant; an indictment by the grand jury was not necessary for trial in the Superior Court. *S. v. Freeman*, 172 N. C., 925, and cases cited.

In the affidavit upon which the warrant was issued it is charged "that on or about 10 December, 1925, John Nelson and James Pace did unlawfully and wilfully assist Gudger Cothran to escape from the common jail of Cherokee County," and "that said Cothran was on said date duly and lawfully in the care and custody of the jailer of Cherokee County."

All the evidence is to the effect that Gudger Cothran was in the care and custody of the jailer under an order of the county court, directing that he be discharged upon his giving a justified bond in the sum of $1,000 for his appearance at the next term of the Superior Court of said county; that he was discharged by the jailer upon a bond fully complying, in form and amount, with the order of the county court; there is no evidence tending to show that the prisoner participated in or had any knowledge of any statements made to the jailer by his wife or by his sureties, prior to the acceptance of the bond, relative to its sufficiency. The jailer called to him to come down; he came, evidently signed as principal the bond which defendants had already signed as sureties, and which was then in the hands of his jailer. He was thereupon discharged by the jailer. Whether his discharge was authorized by law or not, if it was colorably in compliance with the order of the court, in the absence of knowledge by the prisoner of any defect in the bond, or of any want of authority in the jailer to discharge him, or of any false and fraudulent representations by his sureties by means of which the jailer was induced to accept the bond, it cannot be held that the departure of the prisoner was unlawful. 21 C. J., 833, sec. 20; *Ex parte Eley* (Okla.), 130 Pac., 821. The evidence wholly fails to show that Gudger Cothran escaped from jail, as alleged in the affidavit

and complaint, upon which the warrant was issued, and thereby committed the crime of escape, as defined by the common law or by statute. Blk. Com. Bk. IV, sec. 135; 21 C. J., 826; C. S., 4404. The crime of escape is committed by a prisoner who departs from lawful custody, without force, before discharged by due process of law. It may also be committed by one to whose custody the prisoner has been lawfully committed, either voluntarily or negligently. C. S., 4393. As the evidence fails to show that Gudger Cothran escaped from jail, it must follow that it also fails to show that defendants assisted in the commission of a crime by Gudger Cothran.

This case is easily distinguished, we think, from *S. v. Carivey,* 190 N. C., 319. In that case, as in this, the prisoner was lawfully confined in jail. Upon the indictment in that case it was held that the defendant was properly convicted of an attempt to commit the crime of rescue. The indictment did not charge an escape by the prisoner, but a rescue by defendant. The evidence was held to be sufficient to support a conviction of an attempt to rescue. The verdict and judgment were sustained under C. S., 4640.

Whether defendants made a false and fraudulent representation to Mrs. Morrow, as to the clerk's instructions with reference to the bond, is not determinative of the guilt or innocence of defendants upon the charge contained in the complaint upon which the warrant was issued. Defendants are charged, not with making false and fraudulent representations, and thereby procuring the release of the prisoner, but with assisting him to escape. The evidence fails to sustain this charge. There was error in refusing defendants' motion for judgment in accordance with C. S., 4643. The judgment is reversed. Let the action be remanded that judgment may be entered in the Superior Court of Cherokee County, in accordance with this opinion. *S. v. Moore,* 166 N. C., 371.

Reversed.

MARSHALL A. HELMS, ADMINISTRATOR, v. CITIZENS LIGHT AND POWER COMPANY, CALDWELL POWER COMPANY ET AL.

(Filed 31 December, 1926.)

Negligence—Electricity—Dangerous Instrumentalities—Due Care — Evidence—Nonsuit.

A great degree of care must be exercised by those engaged in the transmission of wires carrying a high and deadly current of electricity used in their business, commensurate with the danger caused to others thereby; and where there is evidence on the trial to recover damages for an injury negligently causing death to plaintiff's intestate, that the de-

fendant had not used instrumentalities provided by other like companies under the circumstances, it is sufficient to take the case to the jury and deny the defendants' motion as of nonsuit.

APPEAL by defendant, Caldwell Power Company, from *Stack, J.*, at February Term, 1926, of UNION.

Civil action to recover damages for the death of plaintiff's intestate, alleged to have been caused by the wrongful act, neglect or default of the defendant, Caldwell Power Company, in failing properly to guard one of its high-powered electrical transmission wires or in negligently constructing the same over the telephone wires of the Lenoir Electric Company, in consequence of which the two wires, both being uninsulated, came in contact with each other and caused a deadly current of electricity to be transmitted from the defendant's highly charged wires over and along the telephone wires of the Lenoir Electric Company and into the body of plaintiff's intestate, causing instant death.

Upon denial of liability and issues joined, the jury returned the following verdict:

"1. Was the plaintiff's intestate injured and killed by the negligence of the defendant, Caldwell Power & Light Company, as alleged in the complaint? Answer: Yes.

"2. Did the plaintiff's intestate by his own negligence contribute to his injury and death, as alleged in the answer? Answer: No.

"3. What damages, if any, is the plaintiff entitled to recover of the defendant, Caldwell Power & Light Company? Answer: $6,122.67."

From a judgment on the verdict for plaintiff, the defendant, Caldwell Power Company, appeals, assigning errors.

Vann & Milliken for plaintiff.

W. C. Newland, Mark Squires, Gillam Craig and Plummer Stewart for defendant, Caldwell Power Co.

STACY, C. J. Evidence was offered on the hearing in support of plaintiff's allegations of negligence, tending to show:

1. That plaintiff's intestate was a lineman employed by H. R. Cook in the construction of, or in adding new wires to, a telephone line from Lenoir to Blowing Rock, belonging to the Lenoir Electric Company.

2. That while engaged in the performance of his duties as said lineman, plaintiff's intestate was killed by reason of the escape of a high voltage of electricity from the transmission line of the defendant, Caldwell Power Company, on to the telephone line of the Lenoir Electric Company, which instantly came in contact with the body of plaintiff's intestate and thereby caused his death.

3. That at the place where plaintiff's intestate was killed, the power line crosses over the telephone line in a narrow valley, and on each side of this valley the hills rise sharply to an elevation which causes the telephone poles to reach practically to the same height as that of the power line, although the power line, where it crosses the telephone line, is some eight or ten feet above the pole to which the telephone wires are tied in the valley. But if one of the telephone wires should break loose from the pole in the valley it would be liable to, and in the instant case did, fly up and strike the transmission wire of the Caldwell Power Company. This telephone line had been in existence for thirty years or more, while the defendant's power line had only recently been constructed, and plaintiff's intestate was engaged in stringing new telephone wires across the valley and was about two poles away from the power line when he received the deadly shock.

4. That no net or bridge or other means of protection was used at this "crossing" to keep the telephone wires from being drawn up or from flying up, and striking the transmission wires of the defendant, or to protect the lower wires in case the transmission wire should burn in two and fall, as is in general and customary use.

Upon these, the facts chiefly pertinent, viewing them in their most favorable light for the plaintiff, the accepted position on a motion to nonsuit, we think his Honor correctly ruled that the case was one properly to be submitted to the jury. The situation was unusual, and the twelve might well have concluded, as they did, that the defendant failed to exercise sufficient prevision to exclude liability for injury resulting to plaintiff's intestate under the abnormal conditions here presented. Note, 14 A. L. R., 1023 *et seq.*

Electric companies are required to use reasonable care in the construction and maintenance of their lines and apparatus. The degree of care which will satisfy this requirement varies, of course, with the circumstances, but it must always be commensurate with the dangers involved, and where the wires maintained by a company are designed to carry a strong and powerful current of electricity, the law imposes upon the company the duty of exercising the utmost care and prudence consistent with the practical operation of its business, to avoid injury to those likely to come in contact with its wires. 9 R. C. L., 1200.

Negligence is doing other than, or failing to do, what a reasonably prudent man would have done under the same or similar circumstances. In short, negligence is a want of due care; and due care means commensurate care, under the circumstances, tested by the standard of reasonable prudence and foresight. *Moore v. Iron Works,* 183 N. C., 438. When such negligent breach of duty is the proximate cause of an injury, liability attaches therefor under the law. *Ramsbottom v. R. R.,* 138 N. C., 41.

The question of liability has been so fully and satisfactorily discussed in the recent case of *McAllister v. Pryor,* 187 N. C., 832, opinion by *Associate Justice Clarkson,* that we deem it unnecessary to do more than refer to this decision, as authority for the correctness of the position that the motion for judgment as of nonsuit was properly overruled. *Shaw v. Public Service Corp.,* 168 N. C., 611; *Benton v. Public Service Corp.,* 165 N. C., 354; *Turner v. Power Co.,* 154 N. C., 131; *Mitchell v. Electric Co.,* 129 N. C., 166.

The remaining exceptions call for no extended discussion. They relate to the admission and exclusion of evidence, and there is one directed to a portion of the charge, but, after a careful scrutiny of the record, we are of opinion that they should be resolved in favor of the validity of the trial.

An involuntary judgment of nonsuit was entered as to all the defendants except the Caldwell Power Company, but the correctness of this ruling is not before us for review. The plaintiff has not appealed.

The verdict and judgment will be upheld.

No error.

STATE v. HENRY ADAMS.

(Filed 31 December, 1926.)

Certiorari — Habeas Corpus — Fugitives From Justice — Requisitions — Judgments—Appeal and Error—Review.

Where the Governor of this State has passed upon and allowed a requisition of the Governor of another State for a fugitive from justice who has there been convicted of crime, and in proceedings in *habeas corpus* there is no valid defense made to the judgment concerning which the requisition had been made and allowed, a *certiorari* will be denied in the Supreme Court to bring the proceedings had below up for review.

PETITION for *certiorari,* in lieu of appeal, to review judgment of *Barnhill, J.,* rendered 14 August, 1926, at Rocky Mount, on return to writ of *habeas corpus,* refusing to discharge the petitioner from custody.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

John L. Bridgers and Henry C. Bourne for petitioner.

STACY, C. J. The petition made to this Court for a *certiorari,* is based on the following material allegations:

1. That in July, 1926, the petitioner was convicted in the State of Georgia of violating the prohibition law, and, by way of punishment,

was given ten days within which to pay a fine of $150.00 and costs, failing in which he was to serve a term of six months on the county roads of Chattooga County. Being unable to raise said fine, the petitioner departed from the State of Georgia and came to North Carolina, intending to remain here permanently and to make his home in this State.

2. That a requisition for the extradition of the petitioner was duly made by the Governor of the State of Georgia upon the Governor of this State, and after a hearing before the Governor of North Carolina, said requisition was honored and a warrant of extradition duly issued for the petitioner and delivered to the agent of the State of Georgia.

On the hearing before Judge Barnhill, it was admitted "that the said requisition papers are regular and in proper form." Upon this admission, petitioner's application for discharge from custody was denied.

Other allegations are set out in the petition with respect to the manner in which the petitioner was arrested and held prior to the issuance of the extradition warrant by the Governor, but these, it would seem, are no longer material in view of the admission made on the hearing and incorporated in the judgment refusing to discharge the petitioner.

While the petitioner's first allegation is couched in soft language, nevertheless it is to the effect that he is a "fugitive from justice" within the meaning of the law. *In re Sultan,* 115 N. C., 57; *S. v. Hall, ibid.,* 817. The petitioner neither denies his identity nor challenges the sufficiency of the charge. 11 R. C. L., 734 *et seq.* That he was properly convicted of a crime in the State of Georgia is conceded. Hence, it appears that the judgment refusing to discharge the petitioner is correct. His application for *certiorari* to review the judgment must be denied. For a general discussion of the questions sought to be presented, see *Robb v. Connolly,* 111 U. S., 624.

Certiorari disallowed.

H. D. BAKER ET AL. v. J. R. HARE ET AL.

(Filed 31 December, 1926.)

1. Appeal and Error—Certiorari—Docketing—Record Proper.

The docketing of the record proper in the Supreme Court is a prerequisite to the consideration of a motion therein made for a *certiorari* to bring the appealed case up for review.

2. Same—Extension of Time to Serve Case—Laches.

Where the parties have agreed upon such extension of time for the service of their respective cases on appeal that the delay will cause the docketing of the case too late to come within the rule, the appellant having used his full time may not successfully move in the Supreme Court for a *certiorari* upon the ground that the delay was caused by a loss of the papers in it, for which he was not responsible, without proof sufficient to overcome evidence in denial of the allegation.

MOTION for *certiorari* to have case brought up from BUNCOMBE Superior Court and heard on appeal.

Geo. W. Garland for defendants, movants.
Thomas S. Rollins for plaintiffs, respondents.

STACY, C. J. This was a civil action to recover damages for an alleged breach of a covenant of seizin in a deed given for the exchange of certain lands, tried before his Honor, A. M. Stack, Judge Presiding, and a jury, at the July Term, 1926, Buncombe Superior Court, and from a verdict and judgment in favor of plaintiff, the defendants gave notice of appeal to the Supreme Court. By consent, defendants were allowed sixty days within which to prepare and serve statement of case on appeal, and plaintiffs were allowed sixty days thereafter to file exceptions or counter statement of case. This application for *certiorari* was made 7 December for the reason, as alleged by movants, that all the papers in the case were lost or misplaced for a time, and appellants were unable, in the exercise of due diligence on their part, to have the appeal ready for argument at the call of the docket from the 19th District, the district to which the case belongs.

These allegations are denied by the plaintiffs with some vigor, which denial is supported by affidavit from the clerk of the Superior Court of Buncombe County, but we deem it unnecessary to go into the merits of the controversy, except to say that for two reasons the motion must be denied:

1. Because no transcript of the record proper, or any part thereof, has been filed in this Court as a necessary requirement before application for a writ of *certiorari* will be entertained. *Murphy v. Electric Co.*, 174 N. C., 782; *Burrell v. Hughes*, 120 N. C., 277. 2. Because the defendants by agreeing to such a long extension of time for serving statement of case on appeal and by taking the full sixty days allowed to them, thereby put it out of their power to have the appeal ready for argument as required by the rules of the Supreme Court. This they did at the risk of losing their right of appeal, and, as might have been expected, they have lost it. There is nothing on the record to suggest the necessity of any unusual time in preparing the case on appeal. *Trust Co. v. Parks*, 191 N. C., 263; *S. v. Surety Co., ante*, 52.

The adjective law is not to be enforced harshly or oppressively, but rather in a spirit of liberality, to the end that justice may be administered in all cases. But this does not mean that procedural statutes will be construed by the courts in a manner so as to favor the negligent and at the same time penalize the diligent party. *Vigilantibus et non dormientibus subvenit lex:* "The law comes to the assistance of the diligent, and not to those who sleep upon their rights." When litigants resort to the judiciary for the settlement of their disputes they are invoking a public agency, and they should not forget that rules of procedure are necessary, and must be observed, in order to enable the courts properly to discharge their duties.

The facts chiefly pertinent are not unlike those appearing in the case of *Finch v. Comrs.*, 190 N. C., 154, where a similar motion was denied.

Motion denied.

JIM WATSON v. SYLVA TANNING COMPANY.

(Filed 31 December, 1926.)

1. Evidence—Trials—Appeal and Error.

Evidence erroneously admitted on direct examination is not reversible error when again brought out on cross-examination, or evidence of the same character is admitted without objection from the appellant.

2. Negligence—Master and Servant—Employer and Employee—Reasonable Care—Safe Place to Work.

It is the duty of the employer to furnish his employee in the exercise of reasonable care, a safe place to work, etc., in the course of his employment.

APPEAL from *Oglesby, J.*, and a jury, at February Term, 1926, of JACKSON. No error.

Walter E. Moore and Sutton & Stillwell for plaintiff.
Alley & Alley for defendant.

CLARKSON, J. This case was here before on appeal by defendant and a new trial awarded on account of error in the court below for failure to comply with C. S., 564. See 190 N. C., p. 840.

In the present appeal, assignments of error are in regard to erroneous admission of evidence. We think the evidence was not prejudicial, from the cross-examination and other evidence of similar import brought out and introduced by defendant, and the case of *Cook v. Mebane,* 191 N. C., p. 7, and *Hanes v. Utilities Co., ibid.,* p. 19, and cases cited, approbate.

Another contention of defendant is that the charge of the court below makes it the duty of the employer, in the exercise of ordinary care, to furnish the employee a *safe place* to work, and that this is error; that the place must be *reasonably safe* and not *safe,* we cannot so hold. The court charged as follows: "The court further charges it is the duty of the master to use reasonable care and prudence in providing a safe place for his servant to work, and reasonably safe tools and appliances with which to do and perform his work."

As to the degree of care that the employer owes his employee, we think the charge sustained by *Riggs v. Mfg. Co.,* 190 N. C., p. 258. This Court said: "It is well settled in this State 'that an employer of labor in the exercise of reasonable care, must provide for his employees a safe place to do their work and supply them with machinery, implements and appliances, safe and suitable for the work in which they are engaged, and to keep such implements, etc., in safe condition as far as this can be done by the exercise of proper care and supervision,'" citing numerous authorities. Some of the decisions use the words "safe place" or "reasonably safe place" and "safe appliances, tools," etc., or "reasonably safe appliances, tools," etc., but this it not the error. All the cases hold that these duties must be complied with in the exercise of reasonable or ordinary care, or in the use of ordinary care and prudence; "such care as a prudent man would exercise under similar circumstances." The error, as held in all the decisions, is the omission of this qualifying phrase. *Lindsey v. Lumber Co.,* 190 N. C., 844; *Clinard v. Electric Co., ante,* 736.

From a perusal of the record, we are of the opinion that the action was carefully tried by the court below and in law we can find

No error.

LUCY BRIGMAN v. FISKE-CARTER CONSTRUCTION CO.

(Filed 31 December, 1926.)

1. Trespass—Husband and Wife—Implied Invitee.

A wife who accompanies her husband in his automobile to the defendant's place of business in search of work, when the husband has been requested to do so by the defendant or his authorized agent, and he has parked at the place used by the owner on his premises for that purpose, is an implied invitee.

2. Same—Negligence—Master and Servant—Employer and Employee—Principal and Agent.

While ordinarily one who is an implied invitee on the premises of another cannot recover damages for a personal injury caused by condi-

tions that are not observable as a danger or menace to safety, this rule is not applicable when the injury occurs through the positive act of negligence of the owner, or the act of his authorized agent when in the performance of his duty to the owner.

3. Same.

Where at the request of the authorized agent of a manufacturing corporation one seeking employment has returned to the premises of the concern in an automobile, accompanied by his wife, and parked his car at the customary place therein, the defendant corporation is liable in damages in the wife's action therefor for the negligence of its employee driving a truck in backing into the plaintiff's automobile, proximately causing a personal injury to her.

CIVIL ACTION, tried before *Harding, J.*, and a jury, at June Term, 1926, of BUNCOMBE.

The plaintiff, Lucy Brigman, is the wife of W. B. Brigman and instituted an action for damages against the defendant. The husband, W. B. Brigman, also instituted an action against the defendant to recover for loss of services of his said wife and expenses incurred by reason of her injury. Both cases were consolidated and tried together.

Plaintiff, W. B. Brigman, is a carpenter, and the defendant operates a bleaching plant about three miles east of the town of Biltmore.

There was a road or driveway upon the premises, and the plaintiff, W. B. Brigman, "drove on to the defendant's property and parked his automobile in the parking space, where he had on two former occasions seen other automobiles parked and where two automobiles were then parked." His car was parked about fifteen or twenty feet from the road.

The plaintiff, W. B. Brigman, testified: "I went up there because the superintendent had told me before that I might have a job or there might be an opening in two or three weeks, and I went up there to see about the job. . . . I had business with the Fiske-Carter Construction Co. I had business with the Fiske-Carter Construction Co. each time, and also this time. . . . The superintendent told me to come back the second trip. I had made one trip up there, and he told me to come back the second trip and there would be an opening for me; my wife and son went with me; that is the reason they were along."

The male plaintiff parked his car and his wife and son remained in the car while he went in search of the superintendent in order to see about getting work in response to the invitation of the superintendent, given to him at some previous time.

The plaintiff, Mrs. Brigman, testified: "After he (husband) left I saw a little truck come up the road there, went out toward the main office at the upper end of the works; that was in the direction that my

husband went; I next saw a truck come backing back on the right; when I saw it coming back I threw up my hands; it looked like it was coming right straight back into my car and I threw up my hands and hollowed; I did not have time to get out of the car, and I sat still and threw up my hands and hollowed as loud as I could hollow, and when he struck the door it came through six or eight inches, . . . and the car came back and broke the door . . . and struck my ankle joint . . . and ruined it. . . . I did not have any warning or notice that the truck was going to back out until I saw it coming; it was four or five feet from me, I guess, when I saw it backing out of the road. It was a little parking place there. It is where the employees park their cars."

The plaintiff, Mrs. Brigman, further testified: "My car was standing in the little parking place; the truck came right in front of me; I paid no attention to it on account of looking at the drilling; there was terra cotta piping on the truck, piled up; the driver said "he was not paying any attention to where he was backing."

Issues of negligence, contributory, and damages were submitted to the jury and answered in favor of the plaintiff. The damage awarded to Mrs. Brigman was $2,000.00, and to her husband the sum of $150.00.

From the judgment upon the verdict the defendant appealed.

Cocke & Cocke and Mark W. Brown for plaintiff.
Thomas S. Rollins for defendant.

BROGDEN, J. The question is this: What duty did the defendant owe the plaintiff, Lucy Brigman, under the circumstances disclosed by the evidence?

The defendant contends that the plaintiff, Lucy Brigman, was a trespasser or a mere permissive licensee and relies upon the principle of law announced in the case of *Sweeny v. Old Colony R. R.*, (Mass.). 10 Allen, 368; 87 American Decisions, 644, which is thus stated: "In order to maintain an action for an injury to person or property by reason of negligence or want of due care, there must be shown to exist some obligation or duty towards the plaintiff, which the defendant has left undischarged or unfulfilled. This is the basis on which the cause of action rests. There can be no fault or negligence or breach of duty where there is no act or service or contract which a party is bound to perform or fulfill. All the cases in the books in which a party is sought to be charged on the ground that he has caused a way or other place to be encumbered, or suffered it to be in a dangerous condition, whereby accident and injury have been occasioned to another, turn on the principle that negligence consists in doing or omitting to do an act

by which a legal duty or obligation has been violated. Thus a trespasser who comes on the land of another without right cannot maintain an action if he runs against a barrier or falls into an excavation there situated. The owner of the land is not bound to protect or provide safeguards for wrongdoers. So a licensee, who enters on premises by permission only, without any enticement, allurement, or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. He goes there at his own risk, and enjoys the license subject to its concomitant perils. No duty is imposed by law on the owner or occupant to keep his premises in a suitable condition for those who come there solely for their own convenience or pleasure, and who are not either expressly invited to enter or induced to come upon them by the purpose for which the premises are appropriated and occupied, or by some preparation or adaptation of the place for use by customers or passengers, which might naturally and reasonably lead them to suppose that they might properly and safely enter thereon."

In that case the plaintiff was injured while crossing the defendant railroad as a licensee, "on a private way," leading from South Street to Federal Street in Boston. The defendant had made a plank crossing and kept a flagman there, partly to protect their own property and partly to protect the public. The plaintiff approached the crossing with a horse and wagon loaded with empty beer barrels. The flagman stopped him and then indicated that it was safe for him to cross. As he was crossing, a box car, pushed by an engine, struck him and broke both of his legs. The *Sweeny case* has been cited and approved in this State in the following cases: *Quantz v. R. R.*, 137 N. C., 136; *Monroe v. R. R.*, 151 N. C., 374; *Muse v. R. R.*, 149 N. C., 443; *Briscoe v. Lighting & Power Co.*, 148 N. C., 403; *Money v. Hotel Co.*, 174 N. C., 508, and perhaps other cases.

In authoritative decisions of this and other jurisdictions the degree of care to be exercised by the owner of premises to a person coming upon the premises, depends in the last analysis upon the attendant facts and circumstances. Thus, the measure of care due by an owner of premises varies with respect to whether the person upon the premises is a trespasser, a bare or permissive licensee, merely for his own convenience, pleasure or curiosity, or upon the premises by virtue of some invitation or inducement from the owner, either express or implied. The general rule is that a trespasser or permissive or bare licensee upon the property of another cannot recover for defects, obstacles or pitfalls upon the premises, unless the injury shall result from wilful or wanton negligence. *Quantz v. R. R.*, 137 N. C., 136; *Peterson v. R. R.*, 143 N. C., 260; *Briscoe v. Lighting and Power Co.*, 148 N. C., 396; *Bailey*

v. R. R., 149 N. C., 169; *Monroe v. R. R.*, 151 N. C., 374; *Money v. Hotel Co.*, 174 N. C., 508; *Jones v. Bland*, 182 N. C., 70.

Upon the other hand, if a person enters upon the premises of another by reason of express or implied invitation, the owner is bound to exercise ordinary care for his safety. In discussing this aspect of the law, *Bigelow, C. J.*, in the *Sweeny case, supra*, says: "The true distinction is this: A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability; but if he directly or by implication induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use, and for a breach of this obligation he is liable in damages to a person injured thereby." *Whitley v. R. R.*, 122 N. C., 987; *Morrow v. R. R.*, 134 N. C., 92; *Fortune v. R. R.*, 150 N. C., 695; *Leavister v. Piano Co.*, 185 N. C., 152.

The strict rule exempting the owner of premises from liability to a licensee is ordinarily applied when the negligence of the owner is passive. If the owner, while the licensee is upon the premises in the exercise of due care, is affirmatively and actively negligent in the management of his property or business, as a result of which the licensee is subjected to increased hazard and danger, the owner will be liable for injuries sustained as a result of such active and affirmative negligence. This distinction was referred to by *Justice Manning* in *Monroe v. R. R.*, 151 N. C., at p. 377.

In *Ferrell v. R. R.*, 172 N. C., at p. 684, *Justice Hoke* says: "It is undoubtedly the general rule that a trespasser cannot maintain an action against the owner for negligent injuries received by reason of conditions existent upon the premises, but this is a principle growing out of and dependent upon the right of ownership and considered essential to their proper enjoyment. All of the decisions in this jurisdiction, cited in support of defendant's exceptions, are cases of that character. *Briscoe v. Lighting and Power Co.*, 148 N. C., 396, and others. Even as to suits of that kind, the position has been very much qualified, as in case of technical trespass, etc." In *Stevens v. Nichols*, 155 Mass., 475, it is held that "the licensor has, however, no right to create a new danger while the license continues." In *Reardon v. Thompson*, 149 Mass., 267, the *Sweeny case, supra*, is cited and approved, but *Justice Holmes*, speaking for the Court, says: "No doubt a bare licensee has some rights. The landowner cannot shoot him. It has been held that an owner would be liable for negligently bringing force to bear upon the licensee's person, as by running him down without proper warning."

The principle is thus stated in 1 Ann. Cas., p. 210: "But the freedom from liability of the owner to the licensee exists only when the negligence of the former is passive, the negligence of omission. If the

owner is affirmatively and actively negligent in the management of his property or business, thereby subjecting licensees to unusual and great danger, the owner will be liable for injuries thus occasioned." In support of this principle, the author cites *Larmore v. Crown Point Iron Co.,* 101 N. Y., App., 391. In that case the plaintiff went upon the premises of the owner to seek employment and was seriously injured by a lever which was thrown out of its socket, striking him and breaking both legs. Recovery was denied for the reason that the plaintiff was upon the premises "by the mere implied sufferance or license of the defendant, and not on its invitation express or implied"; and therefore the defendant was not liable "for injury happening from the operation of a defective machine on the premises not obviously dangerous." But the Court says further: "The duty of keeping premises in a safe condition even as against a mere licensee may also arise where affirmative negligence in the management of the property or business of the owner would be likely to subject persons exercising the privilege theretofore permitted and enjoyed to great danger. The case of running a locomotive without warning over a path across the railroad which had been generally used by the public without objection, furnished an example. . . . The machine was not intrinsically dangerous; the plaintiff was a mere licensee; the negligence, if any, was passive and not active, of omission and not of commission."

Also, in *Corrigan v. Union Sugar Refinery,* 98 Mass., 577, the plaintiff in going through a private passageway owned by the defendant was struck and injured by barrels thrown out the windows of the building by defendant's agents. The Court cites the *Sweeny case,* but says: "Even if he was there under a permission which they might at any time revoke, and under circumstances which did not make them responsible for any defect in the existing condition of the way, they were still liable for any negligent act of themselves or their servants which increased the danger of passing and in fact injured him."

The rule established by the authorities in this and other jurisdictions is that, while the owner of the premises is not liable to a trespasser, bare or permissive licensee, coming upon the premises for his own purposes or by virtue of curiosity, and wholly disconnected from any business purpose, unless the injury results from the wilful and wanton negligence of the owner; yet this rule is usually restricted to injuries resulting from existent conditions upon the premises, or what is termed passive negligence. Upon the other hand, the owner is liable for any injuries brought about and caused by active negligence in the management or operation of the business or control of the premises, which would increase the hazard to the licensee or trespasser.

So, applying the established rules of liability to the facts of this case, even if the plaintiff was a trespasser or permissive licensee, as contended by the defendant, she was not injured as a result of existent conditions upon the premises or as a result of the passive negligence of omission, but she was injured by the actual negligence of the defendant in backing upon the car in which she was sitting, a loaded truck, without notice or warning, and while she was at a place which the defendant had designated as a parking place for automobiles. She was neither wandering over the premises nor thereupon by reason of idle curiosity, or upon a mission which could fairly be said to be wholly disconnected from the company's business. Her husband had been expressly invited to come upon the premises to seek employment. He, therefore, had a right to go upon the premises; he had a right to park his car near the roadway in the space designated by the defendant for such purpose. The car of the husband was there as a result of the invitation of the defendant, and certainly the plaintiff had a right to go with her husband and to remain in the car which was upon the premises at a proper place, by invitation of defendant, without becoming a trespasser or mere permissive licensee. In truth, the plaintiff's presence upon the premises of defendant was the result of the principle of implied invitation. Her status was that of implied invitee and falls within the principle announced in *Kalus v. Bass,* 122 Md., 467; 89 Atlantic, 731. In that case the defendant advertised "rooms for rent." The father of the plaintiff went to examine the rooms and took the plaintiff, his minor son, along with him. In looking over the premises, a stairway fell, injuring the plaintiff and his father. The Court said: "The question as to the status of the son is one of interest and importance, and we have not found or had referred to us any decisions which deal with such a situation as the one here disclosed." After citing and discussing the *Sweeny case,* the Court says further: "It is a general principle that the natural and probable consequence of an act are presumed to have been intended, and there can be no doubt that the conduct of the defendant in the case at bar was the original and efficient cause which induced the plaintiff's visit with his father to the premises in question with a view to their possible occupation by the family as tenants. The principle of implied invitation is sufficiently broad in its reason and policy to include such an inducement, and to entitle the plaintiff, under the circumstances shown by this record, to have the issue as to the facts upon which he relies, submitted to the determination of the jury."

The same principle has been practiced and applied in this State in the case of *Fortune v. R. R.,* 150 N. C., 695. In that case the wife accompanied her husband to the railroad station for the purpose of see-

ing him off as a passenger for Asheville. *Justice Brown,* speaking for the Court, says: "The defense must properly rest upon the theory that the plaintiff was on the car without defendant's consent, and that, being a trespasser, the defendant owed her no duty, except to refrain from wilful injury. . . . But the plaintiff was not in any sense a trespasser, and under the circumstances of this case her presence on the car platform was neither wilful nor negligent. Her presence there was not wrongful, because a wife who escorts a husband, or a husband a wife, to a seat on a railway train is not a mere trespasser to whom the company owes no duty except to abstain from wilful injury. It is true, plaintiff was not a passenger toward whom the defendant was bound to exercise the highest degree of care, but she was on its premises by its implied invitation, and it was bound to exercise ordinary care for her safety."

We hold, therefore, that the case was properly submitted to the jury, and the judgment is sustained.

No error.

PARKER v. THOMAS AND WAGGONER ET AL.

(Filed 31 December, 1926.)

1. Bills and Notes—Mortgages—Fraud in the Factum—Holder in Due Course—Fraud in the Treaty.

Where a mortgage on lands and the note it secures are obtained through fraud in the *factum,* it is void and the endorsee of the note can acquire no rights thereunder though a holder acquiring the instrument in due course, before maturity and without notice of the infirmity of the instrument, but otherwise if the fraud was in the treaty.

2. Fraud—In Factum—In Treaty.

The established principles applicable to fraud in the treaty or negotiations of an instrument, and fraud in the *factum,* are, as applicable to the former, when under misrepresentations the person not under disability signs the identical instrument intended; when he signs under undue influence; when he may read and understand the instrument, but fails to do so; and as to the latter, where the papers are surreptitiously changed; or where there is false reading thereof upon request to a blind or illiterate person; where the signature is procured by fraud, imposition or artifice; or by trick, artifice or imposition other than false representations as to the contents; or want of identity between the instrument intended and the one signed.

3. Instructions—Statutes—Fraud in the Factum—Appeal and Error—Requests for Instructions.

Where there is evidence in a suit to set aside an instrument for fraud, tending to show the existence of the fraud both in the *factum* and in the

treaty, a failure of the trial judge to charge the principles arising therefrom upon fraud in the *factum*, and to sign a judgment in accordance with the principles of fraud in the treaty, is reversible error under C. S., 564, though a special request therefor has not been tendered by the complaining party.

CIVIL ACTION, before *Lyon, J.*, at March Term, 1926, of MECKLENBURG.

The plaintiff brought a suit against the defendants, Thomas and Waggoner, partners trading under the firm name of Mecklenburg Realty and Insurance Company, J. A. Stokes, trustee Merchants and Farmers National Bank of Charlotte, and J. P. Tucker, alleging that in November or December, 1924, the defendants, conspiring among themselves, devised a plan or scheme to cheat and defraud the plaintiff, and that in furtherance of said plan the defendants, Thomas and Waggoner and Tucker, drafted a note in the sum of $2,600, and a deed of trust upon plaintiff's property, securing said note, and represented to the plaintiff who was an illiterate person, that said note and deed of trust securing same, constituted a deed for plaintiff's land, which she was selling for $3,500.

The plaintiff contended that she was the owner of a home place, and that she was approached by the defendants, Thomas and Waggoner, to ascertain if she would sell her property. After some negotiations the said defendants offered her $3,500 for her property, and she agreed to sell at that price and to buy a piece of property on Rozzell Ferry Road for $5,500 from Mrs. J. E. Taylor.

The plaintiff testified that by request she went to the office of Thomas and Waggoner, and that a deed had been prepared by them for her home place, and that she signed the deed or authorized her daughter to sign same in her behalf.

The defendants contend that what Mrs. Parker signed was a note for $2,600 and a deed of trust securing same.

The plaintiff testified in regard to the transaction as follows:

"I signed what they said was a deed. It was signed by my daughter for me. I cannot read or write much. Mr. Thomas and Mr. Waggoner said I was signing a deed. . . . I never signed a mortgage. . . . I did not sign any mortgage in Mr. Waggoner's office; if I did, I did not know what I was signing. . . . I just signed one paper which they said was a deed. My daughter signed it for me. . . . I did not sign no deed of trust." . . .

The daughter of plaintiff testified: "I signed the deed for mother. . . . I do not know whose signature this is on the other paper you hand me. (Note for $2,600.) It is not mine. It is not my mother's signature either. I could not tell you whose signature that is on this

third paper you hand me. (The deed of trust to J. A. Stokes, Trustee, securing the $2,600 note.) . . . I did not sign the deed of trust dated 19 December, 1924, to J. A. Stokes, Trustee for A. R. Thomas. . . . I did not read the paper they asked me to sign; they did not let me read anything. I asked to read it, but they were in a rush to get through with it. . . . my mother did not sign the paper."

The defendants, Thomas and Waggoner, offered evidence tending to show that the plaintiff came to their office, and that there was presented for her signature this note for $2,600, dated 12 December, 1924, due twelve months after date and payable to A. R. Thomas, and a deed of trust upon her home place, securing said note, to J. A. Stokes, trustee for A. R. Thomas, party of the third part. The note purported to be signed: "Mrs. Mary J. Parker, her X mark." Witness: J. P. Tucker. The deed of trust purported to be signed: "Mrs. Mary J. Parker, her X mark. Witness: J. P. Tucker."

The defendant, Thomas, testified: "I was present when the note and deed of trust, dated 12 December, 1924, was executed. Miss Brown, a notary public, was there then. Miss Brown told Mrs. Parker and her daughter it was for a $2,600 deed of trust on their property in North Charlotte, and they did not say anything, but went ahead and signed it. I do not know who signed the paper for Mrs. Parker, but I think Miss Brown signed it. Mrs. Parker wanted her daughter to sign it, and she said she could not see, for her to go ahead and sign it or get somebody else to sign it and let her make her mark. I did not make any statement to her about it being a deed to her property in North Charlotte."

Miss Brown, the notary public referred to, testified: "I signed that deed of trust from Mrs. Mary Parker to J. A. Stokes, trustee for A. R. Thomas, in the amount of $2,600; that is my writing. . . . I was called in the office to take the notary's acknowledgment. When I got there the paper was handed me, and I looked at it and told Mrs. Parker to sign it, and she said she could not sign her name, and asked her daughter to sign her name for her. I told her she would have to sign her own name or make her mark, and she told me to go ahead and sign her name and she would make her mark, and she did it to both papers. I explained to her what the paper was."

There was other testimony to the same effect.

J. A. Stokes, trustee in the deed of trust, is the cashier of the defendant, Merchants and Farmers National Bank. On 12 December, 1924, the defendant, Thomas, executed a collateral note to the Merchants and Farmers National Bank, attaching the purported Parker note as collateral security thereto, and thereupon, after assurance from reputable attorneys that the title to the property was good, the bank discounted said note, and, after paying off certain prior liens upon the property of

plaintiff, Mrs. Parker, and certain discounts and charges, paid the balance of the net proceeds upon order of the defendant, Thomas, to Mr. Carswell, an attorney. The defendant, Thomas, sent the balance of the proceeds of said note to the plaintiff. This balance amounted to $42.61. Shortly thereafter the plaintiff employed counsel and brought this suit for the purpose of canceling said note and deed of trust for $2,600.

The plaintiff contended that she had agreed to sell her home place for $3,500 and buy the property of Mrs. J. E. Taylor on Rozzell Ferry road, and that she never intended to sign a deed of trust or mortgage upon her home place for $2,600.

The defendants contended that the note and deed of trust was executed by the plaintiff as a part of the transaction to settle the cash payment that the plaintiff was to make upon the Rozzell Ferry road property. The defendant bank contended that, as it had discounted the Thomas note to which plaintiff's note was attached as collateral without notice of any fraud as alleged by the plaintiff, it was an innocent purchaser of the plaintiff's note for $2,600.

The issues and answers of the jury thereto were as follows:

1. Was the execution of the bond secured by, and the deed of trust recorded in Book 571, page 33, of the Mecklenburg County registry, procured by the false and fraudulent representations of the defendants, or either of them, that said documents constitute a deed conveying said lands to a purchaser for the sum of $3,500, as alleged in the complaint? Answer: Yes.

2. Was the execution and delivery by plaintiff of the note and deed of trust described in the complaint procured by the fraud and misrepresentation of A. R. Thomas, L. A. Waggoner, partners, trading under the firm name of Mecklenburg Realty and Insurance Company, as alleged in the complaint? Answer: Yes.

3. Did the Merchants and Farmers National Bank of Charlotte, N. C., purchase the note and deed of trust of Mary J. Parker, described in the complaint, in due course, for value, prior to the maturity thereof, and without notice of any defect therein or defense thereto? Answer: Yes, for $2,496.00.

Upon said verdict the plaintiff tendered judgment, decreeing the surrender and cancellation of the note and deed of trust. The trial judge refused to sign this judgment, but signed judgment, the material part of which is as follows: "Now, therefore, upon motion of Cansler & Cansler, attorneys for the defendants, J. A. Stokes, trustee, and Merchants and Farmers National Bank of Charlotte, N. C., it is ordered and adjudged that the promissory note dated 12 December, 1924, executed by plaintiff in favor of A. R. Thomas in the sum of $2,600, as set out in paragraph one of the further answer and defense of said bank

filed in this action, together with the deed of trust from plaintiff, J. A. Stokes, trustee for said A. R. Thomas, recorded in the office of register of deeds for Mecklenburg County, in Book 571, at page 33, as set forth in Exhibit 'A' attached to the complaint in this action, be and the same hereby are declared valid and binding obligations of the plaintiff to the extent of $2,496, with interest thereon from 15 December, 1924, until paid at 6 per cent per annum, payable semiannually on the 12th days of June and December, following the date of said note; that said bank be, and it hereby is declared and adjudged the owner and holder of said note and deed of trust in due course, for value, prior to maturity, and without notice of any infirmities therein.

It is further considered and adjudged that the said note and deed of trust above set out having been obtained by the said A. R. Thomas and L. A. Waggoner by fraud and misrepresentation it is ordered that said note and mortgage as to the said Thomas and Waggoner be declared void and of no force and effect in so far as they are concerned.

It is further ordered and adjudged that the plaintiff recover her costs of the defendants, to be taxed by the clerk of this court."

From the refusal of the judge to sign the judgment tendered by plaintiff, the plaintiff appeals, assigning errors.

J. C. Newell and H. L. Taylor for plaintiff.
Cansler & Cansler for the Bank and J. A. Stokes, cashier.

BROGDEN, J. The dominant question of law presented is, whether or not the transaction constituted fraud in the *factum* or fraud in the treaty.

If the transaction constituted fraud in the *factum,* the note and the deed of trust held by the defendant bank is a nullity and void. If, upon the other hand, the evidence discloses only fraud in the treaty, the note and deed of trust would be voidable as between the original parties thereto, but binding in the hands of a third person who was the innocent holder thereof. The rule is stated thus in *Medlin v. Buford,* 115 N. C., 260: "The first question to be considered is whether the mortgage executed by the defendants to the plaintiff is absolutely void by reason of fraud in the *factum.* If such be the case, it would be immaterial whether the plaintiff is an innocent party, since the deed being a nullity, no rights could be asserted under it in favor of any person whomsoever."

The line of demarcation between fraud in the *factum* and fraud in the treaty is frequently obscure and in a measure dependent upon the attendant facts and circumstances. There are, however, certain well recognized indicia of fraud in the treaty or negotiations between the parties. These may be classified as follows:

1. Where there is misrepresentation as to the contents of the instrument and the person signs the identical instrument which he intended to sign.

2. Where there is undue influence exerted upon the party signing an instrument; provided, of course, he has legal capacity.

3. Where the complaining party can read the instrument which he signs, seals and delivers, but fails, refuses or neglects to do so.

There are also well marked indicia of fraud in the *factum*, which may be classified as follows:

1. Surreptitious substitution of one paper for another.

2. The false reading of a deed or other instrument, upon request, to a blind or illiterate person.

3. Fraud, imposition or artifice practiced upon the person signing an instrument by means of which his signature to the instrument is procured.

4. Where the execution of the instrument is procured by trick, artifice or imposition other than false representations as to the contents of the instrument.

5. Want of identity between the instrument executed and the one intended to be executed. *McArthur v. Johnson,* 61 N. C., 317; *Medlin v. Buford,* 115 N. C., 260; *Dixon v. Trust Co.,* 115 N. C., 274; *Cutler v. R. R.,* 128 N. C., 478; *Griffin v. Lumber Co.,* 140 N. C., 519; *Lanier v. Lumber Co.,* 177 N. C., 200; *Curry v. Malloy,* 185 N. C., 206; *Furst v. Merritt,* 190 N. C., 397.

The plaintiff contends that the answer of the jury to the first issue is a finding of fraud in the *factum*. If this be true, the plaintiff was entitled to the judgment tendered by her and which was refused by the court. There was sufficient evidence of fraud in the *factum* to be submitted to the jury, but an examination of the charge of the court will disclose that this phase of the case was not presented to the jury. If there was fraud in the *factum*, the note and deed of trust never existed in contemplation of law, and the defendant bank could not recover. If, upon the other hand, there was fraud in the treaty, and the bank was an innocent holder, as defined by law, it could recover the amounts properly disbursed by it.

Under these circumstances it was the duty of the trial judge to draw the distinction between the two principles and to declare and explain the law arising on the evidence as required by C. S., 564.

In *Nichols v. Fibre Co.,* 190 N. C., 1, *Connor, J.,* says: "A failure to comply with the statute must be held as error. The error was not waived in this case by failure of the defendant to request special instructions."

The record in this case now before us discloses the identical situation that existed in the case of *Furst v. Merritt, supra.* In that case, the plaintiff was a third party, claiming to be an innocent holder of the instrument in controversy. There was evidence tending to establish fraud in the *factum* and fraud in the treaty. *Stacy, C. J.,* speaking for the Court, said: "The charge of the court, as sent up, is defective in that it fails to draw the distinction between the two pleas, and thus falls short of a declaration and explanation of the law arising on the evidence."

In this case all parties are entitled to have all issues of fact and the law arising thereon clearly and definitely presented to the jury. The record does not disclose that this was done and a new trial is awarded.

New trial.

MRS. SAM RECTOR, ADMX., v. SOUTHERN COAL CO.

(Filed 31 December, 1926.)

Negligence—Animals—Master and Servant—Employer and Employee—Evidence—Nonsuit.

Where the evidence tends only to show that the plaintiff, an employee of the defendant, was experienced in taking care of horses and mules, was injured while in the course of his employment when entering a stall of a mule, by being caught by the animal suddenly turning around and catching him and mashing him between its rump and the side of the stall, causing the injury in suit, without evidence that the mule had by its vicious habits caused injury of this or other like kinds, or that the habits of this particular mule were more vicious than those of mules generally, or that the owner was aware of its being more than ordinarily vicious, defendant's motion for judgment as of nonsuit is properly granted.

CIVIL ACTION, tried before *Harding, J.,* at June Term, 1926, of BUNCOMBE.

The plaintiff, Sam Rector, instituted an action against the defendant for damages sustained by reason of being struck by a mule. The plaintiff died pending the action, and his wife was appointed administratrix, and came into court and adopted the complaint filed in the lifetime of her husband.

Deposition of the deceased was taken prior to his death, in which he testified: "I was employed to do most everything. I fed horses, took care of the barn, chickens, shoveled coal, sawed wood, and just general work. . . . It was my duty to gather the eggs laid by the chickens and deliver them to the Southern Coal Company's office. . . . In

April, 1924, the company had something like twelve to twenty mules. . . . The mules were kept in the stables when they were not at work. The stalls and stables where the mules stood were arranged to head into each other along the walls, and when the mules were in the stalls the back was open. In going into the stalls, it was necessary to pass by where you had a mule in the stall. . . . In April, 1924, the superintendent gave me orders to gather eggs for Mr. Shepherd, on which date the coal company had a mule of vicious habits in one of its stalls. I can't tell you now what the vicious habits of the mule were. . . . If you touched it or went to go by it, it would whirl to get away, and if it could, it would catch you. If you got away, you were lucky, and if you didn't, you had to take it. It was just generally skittish and scared to death all the time. . . . I told Mr. Parker (man in charge of the stables and mules) that old mule was dangerous, and that it would kill somebody some of these days, and he said it had no sense. Mr. Parker told me he would try to get rid of a lot of the mules, but I can't say whether he picked out that identical mule or not."

On the day of his injury the plaintiff was told by his foreman to see if he could find a setting of eggs for a customer. The hens laid in all of the stalls where the mules were kept. The plaintiff took a basket to gather the eggs, and after going into one or two stalls, went to the stall where the mule in controversy was.

The plaintiff testified further: "After I came to the stall and just after I come to this one, I started in and said 'whoa,' and this vicious mule was so quick it knocked the breath out of me. . . . It caught me with its rump against a 4 x 4 post and my back against that post—caught me and pinned me back and just shut my breath off. . . . So far as my duties in taking care of horses and mules were concerned, I knew what to do. . . . I had been familiar with the care of horses and mules part of my life, but had not been fooling with them for about six or seven years, but back of that time I had been. I had worked mules on the farm most of my life, and was pretty well familiar with mules. . . . I know that mules don't have the intelligence of horses. . . . I don't know of any other bad or vicious act committed by the mule except the injury received by me. He nearly ran over me two or three times before. . . . That mule had never injured any other person to my knowledge. If it did injure any person during the time I had charge of it, I don't remember. . . . It was not necessary for me to pass by the hips of the mule in order to gather the eggs, as I could have gone around, untied the mule, and driven it out of the barn, but I never thought of it in that way."

Another witness for plaintiff testified that at the time Rector was injured "this mule was in his stall jumping, and as Rector went in by

the side it jumped against him and knocked him against the wall. After Rector went out the mule was kicking at a cow in the third back stall. The mule jumped against his chest, and the hips of the mule jumped against the chest of Rector and Rector was mashed against the wall of the partition of the stable. . . . The mule was jumping, and he spoke to the mule after he started in and went up to the other side, and, as he did so, the mule's hips caught him against the wall."

Issues of negligence and contributory negligence and damages were submitted to the jury and were answered in favor of the plaintiff in the sum of $600.

From judgment rendered upon the verdict, the defendant appealed.

George M. Pritchard and Thomas S. Rollins for plaintiff.
Weaver and Patla for defendant.

BROGDEN, J. The question of law presented by this case is, what duty does the owner of a mule owe to an employee who has charge of the mule and who goes into the stall where the mule is?

A mule is a melancholy creature. It is a *nullius filius* in the animal kingdom. It has been said that a mule has neither "pride of ancestry nor hope of posterity." Josh Billings remarked that if he had to preach the funeral of a mule he would stand at his head. Men love and pet horses, dogs, cats and lambs. These domestic animals have found their way in literature. Shakespeare said of a horse: "I will not change my horse with any that treads but on four pasterns, when I bestride him I soar, I am a hawk; he trots the air; the earth sings when he touches it." But nobody loves or pets a mule. No poet has ever penned a sonnet or an ode to him, and no prose writer has ever paid a tribute to his good qualities. He is kicked and cuffed, and beaten and sworn at, and frequently underfed and forced to work under extremely adverse conditions; yet, withal, he has a grim endurance and a stubborn courage which survives his misfortunes and enables him to do a large portion of the world's rough work.

It is a matter of common knowledge among men who know mules and deal with them, that they are uncertain, moody, and morose.

This particular mule, charged with injuring plaintiff, was referred to in the oral arugment as an "unsafe mule" and as an "unsafe tool and appliance." The idealist may dream of the day when the "world is safe for democracy," but this event will perhaps arrive long before the world will be safe from the heels of a mule.

The evidence in this case discloses that the mule of the defendant did not kick or bite or attack the plaintiff, but that as the plaintiff went behind the mule into the stall, he whirled around and his rump pressed the plaintiff against a part or partition of the stall and mashed him.

The liability of an owner for injuries committed by domestic animals, such as dogs, horses and mules, depends upon two essential facts:

1. The animal inflicting the injury must be dangerous, vicious, mischievous or ferocious, or one termed in the law as possessing a "vicious propensity."

2. The owner must have actual or constructive knowledge of the vicious propensity, character and habits of the animal. *Cockerham v. Nixon*, 33 N. C., 269; *Harris v. Fisher*, 115 N. C., 318; *Hallyburton v. Fair Association*, 119 N. C., 526; *S. v. Smith*, 156 N. C., 628; *Lloyd v. Bowen*, 170 N. C., 216; *Tolin v. Terrell* (Ky.), 117 S. W., 290; *Dix v. Somerset Coal Co.* (Mass.), 104 N. E., 433; *Haneman v. Western Meat Co.* (Cal.), 97 Pac., 695; *Weigand v. Atlantic Refining Co.* (Pa.), 42 Atlantic, 132.

The general rule supported by the overwhelming weight of authority is thus stated in *Hallyburton v. Fair Asso.*, 119 N. C., 526: "There was no evidence that either of the defendants, at the time the horse was entered, or at the time of permitting him to be entered or run, had any knowledge that he was wild, dangerous or untrained. Before the owner of a domestic animal can be charged for injuries inflicted by it, it must be known that the owner had knowledge of the fact that the animal was vicious or unruly." Also in *S. v. Smith*, 156 N. C., at p. 632, *Justice Walker* says: "Damage may be done by a domestic animal kept for use or convenience, but the rule is that the owner is not liable to an action on the ground of negligence, without proof that he knew that the animal was accustomed to do mischief."

The determinative inquiry, therefore, on this record is whether or not there is any competent evidence that defendant's mule was "accustomed to do mischief."

The testimony of the plaintiff is set out at length. It appears that the plaintiff testified: "I cannot tell you now exactly what the vicious habits of the mule were. . . . If you touched it or went to go by it, it would whirl to get away, and if it could, it would catch you. . . . It was just generally skittish and scared to death all the time. . . . I don't know of any other bad or vicious act committed by the mule except the injury received by me. He nearly ran over me two or three times before. . . . That mule had never injured any other person, to my knowledge. If it did injure any person during the time I had charge of it, I don't remember it." It is true that the plaintiff testified: "I told Mr. Parker that old mule was dangerous and that it would kill somebody some of these days. He said it had no sense." This statement of plaintiff was a mere declaration of a conclusion, and is not supported by his evidence, because it clearly appears that the mule had never injured any one else before or since the injury to the

plaintiff, and that the particular act of the mule in whirling around when the plaintiff went in the stall, was the only "bad or vicious act" committed by him. This evidence would almost amount to giving the mule a "good character."

The defendant offered no evidence, and, after viewing the evidence of the plaintiff with that liberality which the law requires, it does not appear that the act complained of was in itself a vicious act or one flowing from a "vicious propensity." This conclusion is supported by the law as declared in *Tolin v. Terrell, supra,* in these words: "In spite of the fact that there was testimony to show that this mule was of so gentle a disposition the children could play at its heels, it is a matter of common knowledge and common experience that there is no telling when or under what circumstances a mule will or will not kick. The only way to escape danger from the feet of a mule is not to go within the radius of its heels."

In *Dix v. Somerset Coal Co., supra,* the Court said: "So far as appears by the evidence there is nothing to show that before the attack upon the plaintiff the horse ever had exhibited any ugly or mischievous propensities or habits, if they existed." Also in *Haneman v. Western Meat Co., supra,* the Court said: "It does not appear that any person was ever before kicked by him. . . . In this case it is not shown that the horse was possessed of any characteristic vice, or that defendant knew of any such vice."

The case of *Weigand v. Atlantic Refining Co., supra,* is directly in point. In that case the plaintiff was an experienced driver, but had been in charge of the team only four or five days. "In the afternoon, after having returned to the stables and cleaned the mules, he went into the stall for the purpose of leading one of them to the blacksmith shop. As he took hold of the halter, the mule threw its head around, struck the plaintiff and knocked him down, and then struck and kicked him." The Court said: "As it was not shown that the mule had ever before injured or attempted to injure any one, or that it had manifested in any way a vicious disposition, there was nothing in the testimony to warrant a recovery."

Upon the whole record, therefore, we are of the opinion that there was no sufficient evidence that the mule was "accustomed to do mischief," or that the owner had actual or constructive knowledge of any vicious or dangerous habit, or propensity, and that the motion for nonsuit should have been allowed. If recovery could be permitted under the facts in this case, then every farmer or contractor in the State could ill-afford to keep a mule.

Reversed.

I. M. WELCH v. PHŒNIX INSURANCE COMPANY, LTD.

(Filed 31 December, 1926.)

Insurance, Fire—Contracts—Stipulations—Requirements as to Time of Bringing Action.

Where the plaintiff has delayed bringing his action to recover loss by fire under a standard form of insurance, beyond the time therein specified, without evidence of a waiver of this provision of the policy, a judgment as of nonsuit thereon is properly granted.

APPEAL by plaintiff from *Oglesby, J.*, at June Term, 1926, of GRAHAM. Affirmed.

Action on policy of insurance. From judgment dismissing the action, as upon nonsuit, at the close of all the evidence, plaintiff appealed to the Supreme Court.

R. L. Phillips for plaintiff.
Merrimon, Adams & Adams for defendant.

PER CURIAM. The policy on which plaintiff seeks to recover is a Standard Fire Insurance Policy of the State of North Carolina, C. S., 6436-37. It is dated 6 November, 1924, and insures plaintiff and another, as their respective interests may appear, for the term of one year, against loss and damage by fire to property described therein. The policy contains the following clause:

"No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity, unless the insured shall have complied with all the requirements of this policy, nor unless commenced within twelve months next after the fire."

Plaintiff's evidence tended to show that the property covered by the policy was destroyed by fire in November, 1924, after the issuance of the policy; this action was commenced on 16 March, 1926. The judgment dismissing the action is sustained upon the authority of *Tatham v. Insurance Co.*, 181 N. C., 434.

Plaintiff's contention that defendant had waived the provision in the policy limiting the time within which an action must be commenced, cannot be sustained. Neither denial of liability nor refusal to pay the loss is a waiver of this provision. 26 C. J., 481. Section 676. There is no evidence of any intent on the part of defendant not to rely upon this provision, or of any conduct on its part which caused plaintiff to delay bringing his action.

There are other grounds upon which the judgment may well be sustained. Failure of plaintiff, however, to commence the action within

twelve months next after the fire, without allegation and proof of waiver or estoppel, precluding this defense is sufficient. The decisions of this Court are all to this effect. *Beard v. Sovereign Lodge,* 184 N. C., 154, and cases cited in the opinion by *Adams, J.* The judgment is

Affirmed.

THE BOARD OF COMMISSIONERS OF JOHNSTON COUNTY ET AL. v. Z. L. LEMAY.

(Filed 29 September, 1926.)

APPEAL by plaintiffs from judgment of *Sinclair, J.,* 22 May, 1926, of JOHNSTON. Affirmed.

James D. Parker for plaintiffs.
Abell & Shepard and Leon G. Stevens for defendant.

PER CURIAM. We have read with care the facts in the agreed case and the judgment of the court below. In law we can find no reversible error. The judgment of the court below is

Affirmed.

ANNIE PRIDGEN, WIDOW OF J. HENRY PRIDGEN, DECEASED, v. SIDNEY PRIDGEN ET AL.

(Filed 29 September, 1926.)

S. T. Valentine and Cooley & Bone for plaintiff.
W. H. Yarborough, Austin & Davenport and W. M. Person for defendants.

PER CURIAM. This was a special proceeding brought by plaintiff against defendants to lay off dower in the lands of her husband, J. Henry Pridgen, deceased, in which it was alleged that he was seized and possessed during coverture. The defendants, children of the first marriage, set up as a defense a parol trust and a certain paper-writing in which J. Henry Pridgen reserved a life-estate in the "Hometract" of 115½ acres more or less, on which he resided, and at his death the land to be equally divided between them. The paper-writing was written and executed on the day before J. Henry Pridgen's second mar-

riage, and the paper-writing gave the land at his death to the children of his first marriage.

From a careful review of the evidence we think the court below tried the case in accordance with the opinion of *Varser, J.*, in *Pridgen v. Pridgen,* 190 N. C., p. 102. The judgment below is

Affirmed.

R. G. JACKSON v. GEORGE DAIL.

(Filed 29 September, 1926.)

APPEAL by defendant from *Nunn, J.*, at April Term, 1926, of PITT. No error.

W. A. Darden for the plaintiff.
Skinner, Cooper & Whedbee for defendant.

PER CURIAM. After an examination of the record and the exceptions we find no reversible error.

No error.

GREENVILLE ICE AND COAL COMPANY v. H. C. VENTERS.

(Filed 29 September, 1926.)

Contracts—Statute of Frauds—Direct Obligation to Pay Debt of Another.

An original or direct promise to pay for a commodity or merchandise on the order of the promissor does not fall within the meaning of our statute of frauds, requiring the promise to be in writing to bind the promissor.

CIVIL ACTION, tried before *Nunn, J.*, and a jury, at May Term, 1926, of PITT.

The plaintiff instituted an action against the defendant to recover the purchase price of certain coal sold by the plaintiff to the defendant, but delivered to the Greenville Shelmardine Railroad. There was evidence tending to show that the defendant came to the office of the plaintiff and requested the plaintiff to furnish to the railroad such coal as might be required, and that he would pay therefor. The defendant denied that he had made any such contract with the plaintiff, but that the coal had been purchased for the use of a railroad in which the defendant was interested, and the debt was the obligation of the railroad.

Issues were submitted to the jury and answered in favor of the plaintiff.

From judgment on the verdict the defendant appealed.

Albion Dunn for plaintiff.
L. W. Gaylord for defendant.

PER CURIAM. The only question of law presented is whether or not the debt was the original obligation of the defendant or whether he was secondarily liable thereon.

The only exception in the record is to an excerpt from the charge of the trial judge as follows: "Ordinarily, when you become responsible for another's debt, the contract must be in writing, but, if the promise is made before the goods, in this instance coal, is supplied, it need not be in writing."

The next paragraph in the judge's charge is as follows: "So, if you find by the greater weight of the evidence, the burden being on the plaintiff, by the greater weight of the evidence, that the defendant promised and agreed to pay for such coal as plaintiff furnished to the railroad company, your answer to the first issue would be yes."

It is too well established to require a citation of authorities that the charge of the court must be construed as a whole and in its entirety. The statute of frauds does not apply to an original obligation of the promissor. *Novelty Co. v. Andrews*, 188 N. C., 59; *Jenkins v. Holley*, 140 N. C., 379; *Peele v. Powell*, 156 N. C., 553.

The trial judge properly left with the jury the determination of the question as to whether the defendant expressly promised to pay the debt in litigation. The jury has determined that issue in favor of the plaintiff.

No error.

J. VERNON BLADES v. B. F. PICKLES, TRUSTEE, ET AL.

(Filed 6 October, 1926.)

APPEAL by defendants from *Nunn, J.*, at March Term, 1926, of JONES.

Civil action to quiet title or remove cloud therefrom.

From a verdict and judgment in favor of plaintiff, the defendants appeal, assigning error.

No counsel appearing for plaintiff.
F. C. Brinson and Moore & Dunn for defendants.

PER CURIAM. The appeal presents the single question as to whether the verdict is sufficient to support the judgment. It is found by the jury, in response to the seventh issue, that whatever rights the defendants may have had to the lands in question, they are now barred by the statute of limitations from asserting them. This issue alone disposes of the case and is sufficient to support the judgment. It was submitted without objection, and there is no exception challenging the correctness of the verdict.

No error.

STATE v. C. A. MEYERS.

(Filed 13 October, 1926.)

APPEAL by defendant from *Grady, J.*, at February Term, 1926, of the Superior Court of SAMPSON. No error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Butler & Herring for defendant.

PER CURIAM. The defendant was indicted for a breach of the prohibition law and was convicted. This is his second appeal. *S. v. Meyers*, 190 N. C., 239. The case seems to have been tried in substantial compliance with the previous decision and the law generally applicable, and we find in the record no valid reason for granting another trial.

No error.

IN RE WILL OF MARY E. BELL.

(Filed 13 October, 1926.)

APPEAL by caveators from *Devin, J.*, at June Term, 1926, of CARTERET.

Issue of *devisavit vel non*, raised by a caveat to the will of Mary E. Bell. Alleged mental incapacity and undue influence are the grounds upon which the caveat is based.

The verdict establishes: (1) That the paper-writing propounded was duly executed in manner and form as prescribed by statute for the execution of wills; (2) that Mary E. Bell had sufficient mental capacity

to execute the same as her last will and testament; (3) that its execution was not procured by undue influence; and (4) that the paper-writing propounded, and every part thereof, is the last will and testament of Mary E. Bell, deceased.

From a judgment on the verdict in favor of propounder, the caveators appeal, assigning errors.

Ward & Ward, J. F. Duncan and Cowper, Whitaker & Allen for caveators.

D. L. Ward, M. Leslie Davis and D. L. Ward, Jr., for propounder.

PER CURIAM. A careful perusal of the record leaves us with the impression that the matter has been heard and determined substantially in accord with the principles of law applicable, and that the validity of the trial should be sustained. All questions in dispute have been settled by the verdict, and no action or ruling on the part of the trial court has been discovered by us which we apprehend should be held for reversible error.

The exceptions relating to the admission and exclusion of evidence, and those directed to the charge, must all be resolved in favor of the validity of the trial. No new question of law or one not heretofore settled by our decisions is presented by the appeal. The verdict and judgment will be up held.

No error.

C. L. HINSON v. GEORGE H. DUVAL ET EX.

(Filed 13 October, 1926.)

APPEAL by plaintiff from *Bond, J.*, at February Term, 1926, of LENOIR.

Civil action for damages brought by plaintiff husband against his wife's parents for alienating the affections of his wife and causing her to desert him.

From a verdict and judgment in favor of defendants, the plaintiff appeals, assigning errors.

Shaw, Jones & Jones for plaintiff.

Rouse & Rouse for defendants.

PER CURIAM. The record contains several exceptions which were the subject of earnest debate before us, and while they are not altogether free from difficulty, a careful perusal of the entire record leaves us with the impression that no sufficient evidence, competent to fix the defend-

ants with liability, was offered on the hearing of the cause. In this view of the case, we deem it unnecessary to discuss the assignments of error.

The verdict and judgment will be upheld.

No error.

H. ABDALLAH v. CHARLES F. DUNN AND CLARK MILLER.

(Filed 20 October, 1926.)

APPEAL by defendant, Charles F. Dunn, from *Bond, J.*, at June Term, 1926, of LENOIR. No error.

Two actions, one entitled "Clark Miller v. Charles F. Dunn," and the other, "H. Abdallah v. Charles F. Dunn and Clark Miller," pending in the Superior Court of Lenoir County, were consolidated for trial at June Term, 1924. The relief demanded in both actions required an accounting between defendants Dunn and Miller. Dunn is the holder, by endorsement of the payee, of a note secured by mortgage on land executed by Miller. Since Dunn became the owner of the note Miller has conveyed the land described in the mortgage to plaintiff, Abdallah, who, as part of the consideration for the conveyance, assumed payment of the note. There was a controversy between Miller and Dunn as to the amount due upon the note. From judgment in accordance with the verdict, and admissions in the record, defendant Dunn appealed to the Supreme Court.

Sutton & Green for plaintiff.

Charles F. Dunn in propria sua.

PER CURIAM. Upon an appeal by defendant Dunn to this Court, from judgment rendered at June Term, 1924, of Superior Court of Lenoir County, appellant's assignments of error were sustained and a new trial ordered. *Miller v. Dunn*, 188 N. C., 397. Issues necessary to a judgment finally determining the rights of the parties, involving the amount paid by Dunn to Copeland Bros., by whom the note was transferred to Dunn, and the application of payments, aggregating $100, made by Miller to Dunn, after the transfer of the note, were not submitted to the jury on the former trial. Upon the new trial the facts involved in the issues suggested have been found by the jury, upon competent evidence, and under instructions free from error. Appellant's exceptions to the admission of evidence, to issues submitted, and to the judgment, cannot be sustained. The judgment is affirmed. There is

No error.

MRS. R. G. SHERRILL AND D. & S. MOTOR COMPANY v. C. W. ROBERTSON.

(Filed 20 October, 1926.)

APPEAL by defendant from *Barnhill, J.*, at March Term, 1926, of WAKE. No error.

R. Pearson Upchurch for plaintiff.
B. C. Beckwith for defendant.

PER CURIAM. The plaintiffs instituted this action to recover a judgment for $164.70. They alleged that Mrs. Sherrill was the owner of a Star sedan which had been damaged by the wrongful and negligent conduct of the defendant's son; that the defendant had authorized her to have the car repaired by the D. & S. Motor Company at his expense; that the repairs were made and that the cost was the amount sued for. The defendant denied the alleged agreement and contended that he was not liable for the negligence of his son (who was twenty-three years of age) in driving a car owned by a third party. On the trial there was evidence tending to show that his son had been charged in the city court with reckless driving and that upon the defendant's agreement to pay the damage the judgment against the son was suspended. It is argued that such an agreement should not be enforced because it is contrary to public policy. *Respess v. Spinning Co.*, 191 N. C., 809. The defendant, however, expressly denied that he had made any agreement in consideration of a suspended judgment. This question was not presented to the jury, the issues which were answered against the defendant being whether he had agreed to pay for the repairs, and if so the amount he was due. We find

No error.

J. C. NEAL, JR., v. HAGEDORN CONSTRUCTION COMPANY ET AL.

(Filed 27 October, 1926.)

1. **Reference—Evidence—Appeal and Error—Review.**

The Supreme Court will not on appeal review the findings of the referee, upon sufficient legal evidence, approved by the court.

2. **Contracts—Subcontracts—Direct Promise to Pay—Consideration.**

The direct promise of a contractor to pay for work done for its subcontractor is supported by a consideration, and is enforceable.

APPEAL by defendants from *Midyette, J.*, at January Term, 1926, of BRUNSWICK. Affirmed.

Action to recover for services rendered upon an express contract to pay for same.

From judgment confirming the report of the referee, and in accordance therewith, defendants appealed to the Supreme Court.

C. Ed Taylor for plaintiff.
C. D. Weeks for defendant.

PER CURIAM. Defendants assign as error the refusal of the court to sustain their exceptions to findings of fact by the referee. There was evidence at the hearing to sustain these findings of fact. The controversy between plaintiff and defendants was as to whether the construction company had expressly agreed to pay plaintiff for work which he had performed and which was included in a subcontract between the construction company and Wise & O'Donnell, subcontractors. There was evidence tending to show that plaintiff declined to undertake this work at the request of the subcontractors, and agreed to do the work only after the construction company, at the request of the subcontractors, had agreed to pay for same direct to plaintiff, and not through the subcontractor. Defendants contended that the construction company agreed to make payment for the work to plaintiff, only on account of the subcontractors; that the construction company had overpaid the subcontractors and owed them nothing.

There was sharp conflict in the evidence as to the facts involved in the respective contentions of the parties; as there was evidence, however, to sustain the referee's findings which the judge approved, the assignments of error cannot be sustained. In *Dumas v. Morrison*, 175 N. C., 431, it is said, by *Walker, J.*: "It must be remembered that a judge of the Superior Court in reviewing a referee's report is not confined to the question whether there is any evidence to support his findings of fact, but he may also decide that while there is some such evidence, it does not preponderate in favor of the plaintiff, and thus find the facts contrary to those reported by the referee. The rule is otherwise in this Court, when a referee's report is under consideration. We do not review the judge's findings, if there is any evidence to support them, and we do not pass upon the weight of the evidence."

Upon the findings of fact by the referee, approved by the judge, the Hagedorn Construction Company was primarily liable to plaintiff. Its agreement to pay for the work was not without consideration. It was obligated by its contract with the State Highway Commission to have

this work done. Its agreement with plaintiff was made with the consent, and indeed at the request, of the subcontractor. Assignments of error based upon exceptions to the refusal of the court to sustain their exceptions to the conclusions of law of the referee, cannot be sustained. We find no error. The judgment is

Affirmed.

SAMUEL WOLF v. H. GOLDSTEIN.

(Filed 27 October, 1926.)

Appeal and Error—Judgments Set Aside—Discretion of Court.

The discretion of a trial judge to set aside a verdict is practically unlimited, and will not be reviewed on appeal except in matters of abuse, instances not likely to arise.

APPEAL by plaintiff from *Midyette, J.*, at March Civil Term, 1926, of NEW HANOVER. Affirmed.

Rodgers & Rodgers for plaintiff.
No counsel for defendant.

PER CURIAM. Plaintiff brought this action to recover on certain notes alleged to have been executed by defendant to Mylish, Mann & Drucker, for a valuable consideration, before maturity, endorsed, sold and delivered to the plaintiff by payee. That no part of the notes have been paid, and that the same are due and owing.

Defendant sets up certain defenses not necessary to set forth.

The issues submitted to the jury and their answers thereto, were as follows:

"1. Were the notes sued upon extorted from the defendant by threatening to defeat the offer of composition made by him in the bankruptcy proceedings instituted against him? Answer: No.

"2. Were the notes sued upon procured from the defendant in fraud of his other creditors? Answer: No.

"3. Were the notes sued upon executed by defendant upon the condition that they were to be void if the offer of composition made by him was declined by the United States Court in Bankruptcy? Answer: No.

"4. Is the plaintiff the holder in due course of the notes sued upon? Answer: Yes.

"5. Is the plaintiff owner of the notes? Answer: Yes.

"6. What amount, if any, is the plaintiff entitled to recover? Answer: $1.200 and interest at 6 per cent per annum from dates of notes."

Upon the coming in of the verdict, plaintiff tendered judgment to the court below in accordance with the jury finding. The court below made the following order: "The verdict in this cause is set aside in the discretion of the court." Plaintiff assigned error and appealed to the Supreme Court: "For that the court refused to sign the judgment tendered by plaintiff as set forth in the record and set aside the verdict in his discretion and allowed the defendant the right to file an amended answer of payment."

The trial court has a discretion in respect to setting aside verdict, exercise of which, in the absence of abuse, is not reviewable in the Supreme Court. 15 Enc. Digest of N. C. Reports, p. 112 and cases cited.

Walker, J., in *Jarrett v. Trunk Co.*, 142 N. C., p. 469, says: "While the necessity for exercising this discretion, in any given case, is not to be determined by the mere inclination of the judge, but by a sound and enlightened judgment, in an effort to attain the end of all law, namely, the doing of even and exact justice, we will yet not supervise it, except, perhaps, in extreme circumstances, not at all likely to arise; and it is therefore practically unlimited." *Billings v. Charlotte Observer*, 150 N. C., 540; *Hensley v. Furniture Co.*, 164 N. C., 148; *Settee v. Electric Ry.*, 170 N. C., 365; *Forester v. Betts*, 179 N. C., 608; *Likas v. Lackey*, 186 N. C., 398; *S. v. Sauls*, 190 N. C., 810.

The judgment below is

Affirmed.

L. S. POE, ADMINISTRATOR OF WALLACE I. POE, v. DURHAM PUBLIC SERVICE COMPANY AND THOMAS C. FOSTER.

(Filed 10 November, 1926.)

APPEAL by defendants from *Devin, J.*, at March Term, 1926, of DURHAM. Affirmed.

Action to recover damages for wrongful death. Upon the verdict, there was judgment that plaintiff recover of defendants the sum of $4,500, the amount assessed by the jury as damages which plaintiff was entitled to recover of defendants. From this judgment defendants appealed to the Supreme Court.

J. G. Lee and S. C. Brawley for plaintiff.

W. L. Foushee, Fuller, Reade & Fuller for defendants.

PER CURIAM. The Court being evenly divided in opinion, with respect to the assignments of error upon this appeal, *Brogden, J.*, having been of counsel for defendants, in this action, not sitting, the judgment of the Superior Court of Durham County is affirmed, and stands as the decision in this case without becoming a precedent. *McCarter v. R. R.*, 187 N. C., 863.

Affirmed.

MRS. LILLIE B. PLEASANTS v. CITY OF GREENSBORO.

(Filed 10 November, 1926.)

Municipal Corporations—Government—Negligence.

A city acting in a purely governmental capacity through its agents, is not liable in damages for an injury negligently inflicted by its agent, unless right to recover therefor is expressly or impliedly given under legislative authority.

APPEAL by plaintiff from *Webb, J.*, at August Term, 1926, of GUILFORD. Affirmed.

Frazier & Frazier for plaintiff.
Robert Moseley for defendant.

PER CURIAM. Plaintiff contends that the sole question involved in this action: Where a municipal corporation uses a building owned by it for governmental purposes and also for rent and profit in its private and corporate capacity, does the fact that it is partly used for governmental purposes relieve it from liability where there is negligence with respect to the use of the same building in its private and corporate capacity? This contention, from a careful perusal of the complaint, we do not think is sufficiently shown. The allegations of the complaint, taken in the light most favorable to plaintiff, and giving her the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom, to which she is entitled, we think show that the injury complained of comes under defendant's use of the building in its governmental capacity.

We think the principle applicable to this case is settled by what is said in *Scales v. Winston-Salem*, 189 N. C., p. 470: "'Unless a right of action is given by statute, municipal corporations may not be held civilly liable to individuals for "neglect to perform or negligence in performing" duties which are governmental in their nature, and including generally all duties existent or imposed upon them by law solely for the public benefit.' Municipal Corporations, sec. 2623; *Hill v. Charlotte*, 72 N. C.,

55; *Moffitt v. Asheville,* 103 N. C., 237; *McIlhenney v. Wilmington,* 127 N. C., 146; *Peterson v. Wilmington,* 130 N. C., 76; *Fisher v. New Bern,* 140 N. C., 506; *Harrington v. Greenville,* 159 N. C., 632."

When it is acting in its business or private and corporate capacity, as in operating a water or light plant or other business function, it is liable for the conduct of its agents and servants to the same extent that any other business corporation would be liable under the same circumstances. *Munick v. Durham,* 181 N. C., 195.

The plaintiff in her brief says: "The doctrine of immunity of the municipality as to its torts when exercising certain functions is being questioned as the law progresses. 'There is no logic in holding to this relic of the days of the divine right of kings. The immunity of a sovereign from suit rests upon no formal conception or absolute theory, but on the logical and practical ground that there can be no legal right against the authority that makes the law on which that right depends.' 'Viewed from the practical standpoint of ordinary fairness, there is no valid reason why a municipality which has been guilty of an act for which a private corporation would be liable, should not be required to compensate the injured party.' North Carolina Law Review, Vol. 4 (June, 1926), No. 3, pages 138 and 139."

The distinction between the municipal agencies herein made has been long the settled law of this State, although the line of demarcation sometimes is not easily drawn. The people of the State—the sovereign—(unless restricted by constitutional limitation) through the legislative branch of the State government, can by statute give the right of action, but we are here following a long line of unbroken decisions. The demurrer must be sustained.

The judgment of the court below is

Affirmed.

MEADOR GROCERY COMPANY v. RUFUS VERNON.

(Filed 17 November, 1926.)

Judgments—Attachment—Appeal and Error—Issues — Evidence — New Trials.

Where in the county court the judge has signed the judgment on the jury's verdict that the property was wrongfully attached, the second issue awards damages, and thereafter on motion the judge has set aside the second issue awarding the damages on the ground of insufficient legal evidence, a judgment on appeal in the Superior Court holding that the lower court was in error in setting aside the answer to the second issue is in effect sustaining the first judgment of the lower court, and an order granting a new trial on the second issue is erroneous.

APPEAL by defendant from *Webb, J.*, at June Term, 1926, of ROCKINGHAM. Error.

On the trial in the county court the following verdict was returned:

1. Is Mrs. Ben Gibson, interpleader, the owner of and entitled to the possession of the automobile described in the pleadings? Answer: Yes.

2. Is the attachment against the property of Rufus Vernon wrongful and unlawful? Answer: Yes.

3. If so, what amount, if any, is the said Rufus Vernon entitled to recover of the plaintiff on account of said wrongful and unlawful attachment? Answer: $487.08.

4. In that amount, if any, is the said Rufus Vernon indebted to the plaintiff? Answer: $446.87 with interest.

No counsel for appellee.
Sharp & Crutchfield for the appellant.

PER CURIAM. After the issues had been answered and the judgment had been signed the plaintiff made a motion in the county court to set aside the judgment and the verdict, and the motion was granted only as to the third issue. The first, second, and fourth issues were left standing. The judge of the county court set aside the answer to the third issue on the ground that, there being no evidence to support it, the answer was contrary to law, and thereupon gave judgment in favor of the plaintiff for the amount found to be due in answer to the fourth issue. The defendant appealed to the Superior Court, and his Honor was of opinion that the second judgment was intended to modify the first, and that the only question for decision was whether or not the county court committed error in setting aside the answer to the third issue on the ground it was contrary to law. It was adjudged that the county court was in error, but that a new trial should be had on the third issue. There is no express order vacating the judgment of the county court; but the appellant's exception deals with the assignment of error as if such order had been made.

It is important to note that according to the finding on the second issue the attachment of the defendant's property was wrongful and unlawful. This issue was not disturbed. In the Superior Court the only question was whether there was evidence to support the answer to the third issue; not whether there was error in the instructions given the jury or whether the finding was against the weight of the evidence. In reversing the trial court the Superior Court necessarily held that there was sufficient evidence to sustain the answer, and the reversal on this point reinstated the verdict on the third issue. Whether a new trial should be granted was not involved in the single question whether

as a matter of law the evidence supported the verdict. We think his Honor correct in reversing the county court, but in error in ordering a new trial on the third issue. The result is that the second judgment of the county court is erroneous and the first correct.

Error.

NORTH CAROLINA CORPORATION COMMISSION v. BANK OF HAMLET.

(Filed 17 November, 1926.)

CIVIL ACTION, before *Schenck, J.*, at June Term, 1926, of RICHMOND.

On 21 October, 1925, and on 23 October, 1925, Pine Hall Brick Company shipped from its plant in Stokes County two car loads of brick to F. A. Hillburn at Hamlet, N. C. The bills of lading covering said shipments were sent by the shippers with draft attached to the Bank of Hamlet, marked for "collection only." Upon arrival of the brick at Hamlet, the consignee paid said drafts to the Bank of Hamlet and received bills of lading sent by the Pine Hall Brick Company. The Bank of Hamlet deposited the amount in its general fund, and through its assistant cashier issued to Pine Hall Brick Company checks for the amount of said drafts. One of these checks was drawn on the American Trust Company of Charlotte, and the other on the American National Bank of Richmond, and at the time the cashier of the Bank of Hamlet issued said checks to the Pine Hall Brick Company, the Bank of Hamlet had sufficient deposit to its credit in the banks upon which said checks were drawn to pay said checks. The Pine Hall Brick Company deposited said checks for collection, and before collection could be made, the Bank of Hamlet was placed in the hands of a receiver. The Pine Hall Brick Company filed a claim with the receiver, claiming a preference by reason of the fact that the item was sent to the Bank of Hamlet for "collection only," and title to said fund therefore did not pass to the bank.

The trial judge rendered the following judgment:

"This cause coming on to be heard before the undersigned judge holding the courts of the Thirteenth Judicial District, this, the June Term, 1926, of the Superior Court of Richmond County, upon motion in the cause made by Pine Hall Brick Company, demanding priority of its claim against the Bank of Hamlet, Page Trust Company, and S. O. Bauersfeld, receivers, and being heard upon an agreed statement of facts as appears of record, and after argument of counsel for both plaintiff and defendant, the Court, relying upon the authority of the

Corporation Commission v. Bank, 137 N. C., Report, p. 697, is of opinion that the claim of the plaintiff is not entitled to a preference over general creditors of the Bank of Hamlet:

It is, therefore, considered, ordered and adjudged that the defendants pay said claim pro rata with the other claims of general creditors of the Bank of Hamlet."

F. L. Webster for plaintiff.
Bynum & Henry for defendant.

PER CURIAM. The judgment of the court was correct. The case of *Corporation Commission v. Bank,* 137 N. C., 697, is decisive of all questions presented by this record. The judgment is

Affirmed.

J. L. CROUSE v. GEORGE C. YORK AND GEORGE C. YORK v. J. L. CROUSE.

(Filed 17 November, 1926.)

APPEAL by George C. York from *Shaw, J.,* at September Term, 1926, of GUILFORD. Affirmed.

Hobgood & Alderman and T. J. Hill for appellant.
Frazier & Frazier for appellee.

PER CURIAM. On 28 May, 1926, J. L. Crouse brought suit against George C. York, and on 1 June, 1926, George C. York brought suit against J. L. Crouse. In the first case the defendant York moved to dismiss the action, and his motion was denied; in the second case the defendant Crouse made a motion to dismiss York's action against him, and the motion was allowed. In each instance York excepted and appealed.

His Honor assigned as his reason for dismissing York's action against Crouse that it was begun after the first action was instituted, and that the two suits are between the same parties and involve the same subject-matter, and that the entire controversy can be determined in the action which was first instituted. We concur in the conclusion announced in each case.

Affirmed.

ALICE SIMMONS v. W. H. SIMMONS.

(Filed 17 November, 1926.)

APPEAL by defendant from *Schenck, J.*, at June Term, 1926, of ANSON. Affirmed.

McLendon & Covington for plaintiff.
Enos T. Edwards and Vann & Milliken for defendant.

PER CURIAM. This is an action to have a reasonable subsistence and counsel fees paid or secured to the plaintiff from the estate or earnings of the defendant, her husband, as provided in 3 C. S., 1667. The plaintiff's motion was heard upon the pleadings, the affidavits, and the oral testimony, and it was adjudged that the defendant pay the plaintiff's attorneys $100 for their services, and that he pay into the office of the clerk $35 a month for the benefit of the plaintiff and her child. The judgment must be affirmed upon the authority of decisions heretofore rendered, there being no charge of adultery against the plaintiff. *McManus v. McManus,* 191 N. C., 740; *Price v. Price,* 188 N. C., 640; *Barbee v. Barbee,* 187 N. C., 538; *Anderson v. Anderson,* 183 N. C., 139.

Affirmed.

D. S. SMITH v. H. C. WHITLEY ET AL.

(Filed 24 November, 1926.)

APPEAL by defendants from *Stack, J.*, at February Term, 1926, of STANLY. No error.

Action to recover damages for trespass upon land. Defendants allege that such acts as they committed on the land described in the complaint were lawful by reason of their ownership of the minerals in said land, under a reservation in the deeds in plaintiff's chain of title. The issues submitted to the jury were answered as follows:

1. Did the defendants enter upon and commit trespasses upon the land of the plaintiff, as alleged in the complaint? Answer: Yes.

2. If so, what damages, if any, is the plaintiff entitled to recover of defendants? Answer: $200.

From judgment upon this verdict defendants appealed to the Supreme Court.

No counsel for plaintiff.
Hartsell & Hartsell, R. L. Smith & Son for defendants.

PER CURIAM. Defendants' assignments of error upon this appeal cannot be sustained.

Plaintiff is seized in fee and in possession of the land described in the complaint, subject to the rights of defendants; defendants, by virtue of reservations in deeds under which plaintiff owns said land, own the minerals in same. Defendants went upon the land and did the various acts thereon as alleged in the complaint. The jury upon competent evidence has so found. Under a charge which is free from error, such acts, or some of them, were found by the jury to constitute trespasses upon the rights of plaintiff. The damages were assessed by the jury, upon sufficient evidence, under instructions which are well sustained, both upon principle and by authoritative decisions of this Court. The judgment is affirmed. There is

No error.

L. HARVEY & SON COMPANY, INC., v. I. M. TULL AND WIFE, OLLIE H. TULL, C. OETTINGER, TRUSTEE KINSTON GARAGE, INC., AND W. C. FIELDS.

(Filed 24 November, 1926.)

APPEAL by defendants from *Bond, J.*, and a jury, at February Term, 1926, of LENOIR. No error.

Cowper, Whitaker & Allen and F. E. Wallace for plaintiff.
Rouse & Rouse for defendants.

PER CURIAM. This is a civil action brought by plaintiff for the foreclosure of a deed of trust for $9,017.80, dated 1 June, 1923, on the "Tower Hill" tract of the land of defendant I. M. Tull.

Defendants in their brief say: "It will be of interest to know that this Tower Hill tract was formerly owned by Governor Arthur Dobbs, during whose administration the seat of government was located there, which historical fact is commemorated by a marker placed by the Daughters of the American Revolution. . . . The alleged indebtedness consisted of advances made to the defendant, I. M. Tull, and his tenants for farm supplies for the years 1920, 1921 and 1922, which years brought adversity to the defendant Tull, as to thousands of other farmers throughout the land. Mr. Tull was doing an extensive farming business and was unable to meet the amounts falling due in 1920, 1921 and 1922, and of necessity balances were carried over from year

to year, with the result that in 1923, in the circumstances as related in the evidence, the deed of trust sued on was executed."

Sundry allegations of defense are made that we do not think necessary to set forth seriatim or discuss. They are denied by plaintiff. The issue submitted to the jury was: "What was the total sum due to L. Harvey & Son Company by the defendants, I. M. Tull and wife, when the notes for $9,017.80 and deed of trust to secure the same were executed? Answer: $7,818.69."

We have read carefully the record of 97 pages—plaintiff's brief of 22 pages and defendants' of 14 pages. We have made a thorough investigation of all legal contentions presented on the record by both sides to the controversy, and we can find no prejudicial or reversible error.

"Verdicts and judgments are not to be set aside for harmless error, or for error and no more. To accomplish this result, it must be made to appear not only that the ruling complained of is erroneous, but also that it is material and prejudicial, amounting to a denial of some substantial right. *In re Ross,* 182 N. C., 477; *Burris v. Litaker,* 181 N. C., 376." *Wilson v. Lumber Co.,* 186 N. C., 57; *Lumber Co. v. Sturgill,* 190 N. C., 776.

In *Leak v. Armfield,* 187 N. C., p. 628, it was said: "In *Lea v. Johnson,* 31 N. C., 19, *Pearson, J.,* said: 'Hard cases are the quicksands of the law. In other words, a judge sometimes looks so much at the apparent hardship of the case as to overlook the law.' In *Cureton v. Moore,* 55 N. C., 207, it was said: 'A court of equity can no more relieve against "hard cases" unless there be some ground of equity jurisdiction, than a court of law, for both courts act upon general principles. Equity, as well as law, is a science, and does not depend upon *the discretion* of the court entrusted with equity jurisdiction, or the vague ideas that may be entertained as to "hard cases." It may be "hard measure" to sell, but this is universally so.'" *Griffin v. Griffin,* 191 N. C., p. 227, at p. 230. On the record there is

No error.

FRED HOOD, BY HIS NEXT FRIEND, AND S. L. HOOD v. ORANGE CRUSH BOTTLING COMPANY.

(Filed 1 December, 1926.)

APPEAL by defendant from *Lyon, J.,* at March Term, 1926, of MECKLENBURG. No error.

Two actions, one by Fred Hood, a minor, and the other by S. L. Hood, his father, for damages alleged to have been caused by the negligence of defendant, were consolidated for trial.

From verdict sustaining the allegations of plaintiffs, and determining the amount which each is entitled to recover as damages, defendant appealed to the Supreme Court.

A. B. Justice and John M. Robinson for plaintiffs.
Pharr & Currie and James A. Lockhart for defendant.

PER CURIAM. Fred Hood, a minor 14 years of age, was injured in a collision on a street in the city of Charlotte between the bicycle which he was riding and a truck owned by defendant, and operated by its driver. The jury found that the collision was due to the negligence of defendant, and that Fred Hood did not by his own negligence contribute to his injury as alleged in the answer. The jury further found that Fred Hood was entitled to recover of defendant as damages the sum of $790, and that S. L. Hood, his father, was entitled to recover as his damages the sum of $200.

There was conflict in the evidence as to the manner in which the collision occurred. The jury found the facts to be as testified by witnesses for plaintiff. Miss Hattie Cole, a witness for plaintiff, testified that she saw the collision. She said: "I was going south to Read's store, which is south of the intersection of Vance and Mint streets. To the best of my knowledge, I was about 25 feet from the intersection of Vance and Mint streets when the collision occurred. I saw the automobile before the bicycle came. They were coming toward me. The truck was about a length or two lengths behind the boy; just as he got up, before he got to the intersection of Vance Street, the truck speeded up and tried to get in ahead of the boy up Vance Street. The front part of the truck hit the boy, caught him and the bicycle on the curb, and the back of the truck ran over his foot. The driver of the truck gave no signal before he speeded up. He did not blow his horn and did not throw out his hand. I am not related to Mr. Hood or his family in any way; just know him when I see him; that is all." There was other evidence sustaining the allegations of the complaint.

We find no error upon the trial of these actions. Assignments of error based upon exceptions to the charge of the court to the jury cannot be sustained. The judgment is affirmed.

No error.

RONALD GREENE v. L. B. JACKSON.

(Filed 15 December, 1926.)

APPEAL from *Armfield, Emergency Judge,* at May Term, 1926, of BUNCOMBE.

Civil action to recover damages for an alleged breach of a rental contract.

From a verdict and judgment in favor of plaintiff, the defendant appeals, assigning errors.

Mark W. Brown and Clinton K. Hughes for plaintiff.
Lee, Ford & Coxe for defendant.

PER CURIAM. This case was before us on demurrer at the Fall Term, 1925, 190 N. C., 789. On the second trial in the Superior Court, from which the present appeal is prosecuted, the controversy narrowed itself principally to issues of fact, determinable alone by a jury. A careful perusal of the record leaves us with the impression that the case has been tried substantially in accord with the principles of law applicable, and that the validity of the trial should be sustained. All matters in dispute have been settled by the verdict, and no action on the part of the trial court has been discovered by us which we apprehend should be held for reversible error, even though some of the rulings are not altogether free from difficulty.

We have concluded that the exceptions relating to the admission and exclusion of evidence, and those to the charge, should be resolved in favor of the validity of the trial. The case presents no new question of law, or one not heretofore settled by our decisions. The verdict and judgment will be upheld.

No error.

W. G. DIX ET AL. v. R. H. PRUITT ET AL.

(Filed 15 December, 1926.)

Appeal and Error—Judgment—Verdict Set Aside—Religious Societies—Church Property Custodian.

Where the controversy with regard to the custody of church property depends under the rules of a religious denomination, upon whether the one chosen was qualified to act as pastor, it is reversible error for the trial judge, as a matter of law, to set aside a verdict for the plaintiff upon the ground that the pastor had not been chosen at a duly constituted meeting of the congregation.

DIX *v.* PRUITT.

APPEAL by plaintiffs from *Lane, J.,* at February Term, 1926, of ROCKINGHAM. Error.

This is an action to declare the plaintiffs the owners of certain church property and to enjoin the defendants from interfering with the use and control thereof or in any way obstructing the exercise of the plaintiff's rights therein. A concise statement of the material allegations in the complaint is essential to an understanding of the controversy and to the positions taken by the parties as to their alleged rights.

The Dan River Primitive Baptist Church was organized in Ruffin Township, Rockingham County, in 1884, and in 1900 it bought land and a church building and had the conveyance made to R. H. Pruitt and W. G. Dix as trustees. This church was governed by the rules, customs and usages of the regularly constituted Primitive Baptist denomination, some of which were written and some unwritten. One of the usages is that when a member has been excluded from one church he cannot unite with another of the same faith without first being restored by the church of which he had been a member, and the church that expelled him must withdraw fellowship from any other Primitive Baptist Church that receives him in disregard of the usage. In 1920 J. R. Wilson was called by the Dan River Primitive Baptist Church as its pastor. He had theretofore been a member of the Danville Primitive Baptist Church, and had been excluded from its membership. At the time he was called by the Dan River Church he was not a member of either of these churches. It is alleged that his credentials had been canceled and that he was no longer qualified under the usages of the churches to serve in the capacity of pastor. At a meeting of the Dan River Church held in September, 1923, objection was made to Wilson, as pastor, but it was contended that a majority of those present voted to retain him, and he has since continuously held possession of the church property to the exclusion of the plaintiffs. On 9 October, 1923, the plaintiffs "declared non-fellowship" with the defendants and those united with them in interest. In the Dan River Church there are two factions, one seeking to exclude the other and to recover the church property, and the other retaining possession and denying the plaintiffs' right to recover.

Issues were submitted and answered as follows:

1. Were the plaintiffs and those united with them the sole and only members of the Dan River Primitive Baptist Church on 9 October, 1923? Answer: Yes.

2. Are the plaintiffs and those united in interest with them entitled to the possession of the Dan River Primitive Baptist Church and its records, as alleged in the complaint? Answer: Yes.

The verdict was set aside as a matter of law.

Sharpe & Crutchfield and King, Sapp & King for plaintiffs.
P. W. Glidewell and Brooks, Parker & Smith for defendants.

PER CURIAM. We think his Honor was in error in setting aside the verdict as a matter of law. His conclusion seems to have been based principally, if not entirely, on the action which was taken in a meeting held at the Dan River Primitive Baptist Church on 9 October, 1923, and this action was held to be void by reason of the minority of the members, the time of meeting, the want of notice to the defendants, and the lack of power to exclude them without notice. Upon these grounds it was adjudged that the action of the minority in the meeting was of no effect. This was a misapprehension of the situation. The cause of the action is not dependent on what was done in the meeting of 9 October, for if no such meeting had been held the relative rights of the parties to the church property were still open to litigation. The merits of the controversy embrace questions which may be only incidentally connected with the meeting referred to.

While the judgment must be reversed, we do not now pass upon the question whether the judgment tendered by the plaintiffs should have been signed. The defendants may have other exceptions to be considered on their motion to set aside the verdict or reasons for asking that it be set aside as a matter of discretion. If judgment is rendered for the plaintiffs upon the verdict the defendants will have the opportunity to present for review any exceptions taken and entered of record.

Error.

ROBERT L. SMITH v. PAUL CHATHAM ET AL.

(Filed 15 December, 1926.)

APPEAL by defendant, Paul Chatham, from *Harding, J.*, at February Term, 1926, of MECKLENBURG.

Civil action to recover plaintiff's part of commissions arising from the negotiation of leases between landowners and F. W. Woolworth & Company for storehouses situate in Concord, Monroe, Gastonia, Shelby and High Point.

From a verdict and judgment in favor of plaintiff, the defendant appeals, assigning errors.

A. B. Justice and John M. Robinson for plaintiff.
Cansler & Cansler and H. L. Taylor for defendant.

PER CURIAM. The controversy on trial narrowed itself principally to issues of fact, which the jury alone could determine. All matters in dispute have been settled by the verdict, and no action or ruling on the part of the trial court has been discovered by us which we apprehend should be held for reversible error. A careful perusal of the record leaves us with the impression that the case has been tried substantially in accord with the principles of law applicable.

No error.

RUBY JANE INGE v. ASHEVILLE POWER AND LIGHT COMPANY.

(Filed 15 December, 1926.)

APPEAL by defendant from *Stack, J.*, at August Term, 1926, of the Superior Court of BUNCOMBE. No error.

George M. Pritchard for plaintiff.
Martin & Martin for defendant.

PER CURIAM. The plaintiff brought suit to recover damages for personal injury alleged to have been caused by the negligence of the defendant in driving its street car upon an automobile in which she was riding. The two issues of negligence and damages were answered in her favor, and from the judgment rendered thereon the defendant appealed.

The only exceptions relate to the instruction given the jury on the second issue. A reasonable interpretation of the instruction excludes the recovery of damages upon any element not supported by the evidence, and we find no sufficient ground for awarding a new trial.

No error.

STATE v. EXUM HOOKS.

(Filed 31 December, 1926.)

APPEAL by defendant from *Cranmer, J.*, at August Term, 1926, of WAYNE. No error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.
J. Faison Thompson and Hugh Dortch for defendant.

STATE *v.* HOOKS.

PER CURIAM. The defendant was prosecuted for having liquor in his possession for the purpose of sale and was convicted. We have examined the several assignments of error and find that under numerous decisions all the exceptions must be overruled.

No error.

CASES FILED WITHOUT WRITTEN OPINIONS

In re Application of C. P. Barringer to Practice Law.

West-Menefee Co. v. R. R.

Williams, Receiver, v. Hoffler.

DISPOSITION OF APPEAL FROM SUPREME COURT OF NORTH CAROLINA TO THE SUPREME COURT OF THE UNITED STATES

Wachovia Bank & Trust Company, Administrator of the estate of Theodosia Haynes Taylor v. R. A. Doughton, Commissioner of Revenue of the State of North Carolina. Appeal of plaintiff reversed.

APPENDIX

*TOWN OF NEWTON ET AL. v. STATE HIGHWAY COMMISSION OF NORTH CAROLINA.

1. Pleadings—Admissions—Highways—Roads and Highways — Statutes —Maps—Evidence—Appeal and Error.

Where the Legislature in passing a state-wide statute for the public road system of the State, makes use as a part thereof, of a map showing the connection of the county seats of the State, and the lines of the road are so placed on the map as to show that the highway passed straight through the town and necessarily by the courthouse square, admissions thereof are sufficient to support a finding to that effect.

2. Pleadings—Answer—Admissions—Statutes.

Where matters material to the disposition of the case are alleged in the complaint, they will be taken as admitted if not denied in the answer. C. S., 543.

BROGDEN, J. It is alleged in the petition to rehear that the court erroneously assumed, as a fact that the southern route was shown on the map attached to the Road Act of 1921, and that, as a matter of fact, the location of the road actually shown on said map runs "from Statesville to Newton via the villages of Eufola, Catawba and Claremont, and is, in fact, the location of the Southern Railway shown upon the maps issued by the Corporation Commission." This allegation in the petition to rehear is not sustained by the record before the Court. The record as presented to the Court imports verity, and we are not permitted to go outside the record before us in determining the merits of causes.

It was alleged in the complaint that the present road between Statesville and Newton "is a part of the 5500 miles of State Highway System provided for in the said Act of 1921, as indicated by the map attached to and constituting a part of the said Act of 1921, and the defendant, after the passage of said act, adopted and took over as a part of said State Highway System, the section of road between Statesville and Newton, *indicated on the aforesaid map*, as a portion of Route No. 10, *indicated on and prescribed by the said map* which constitutes a part of said Act of 1921, and has since maintained the same as a part of the said State Highway System."

This allegation is admitted in the answer of the defendant not only in express language but also by reason of its failure to deny the same as provided by C. S., 543.

*(Note.—Giving the reasons of Mr. Associate Justice Brogden in denying the petition to rehear this case, reported *ante*, p. 54.)

In paragraph eight of defendant's answer it is alleged "that if the southern or existing route were to be used the present steel bridge would have to be replaced in order to provide a bridge in keeping with the standards of safety and service which the State Highway Commission is endeavoring to maintain throughout the State." . . . This language in the answer of the defendant is also an admission that the southern route and the existing route are practically the same. From these admissions in the answer of the defendant the trial judge was fully justified in finding as a fact that the "southern route follows, in a general way, the present road between Statesville and Newton, *and is shown on the map which is a part of chapter 2 of the Public Laws of 1921, indicating the designation and adoption of highways in North Carolina constituting a part of the State Highway System. . . . This road would enter the town of Newton in the southeastern portion and pass by the courthouse and along the principal street through the center of the town, and thence to Hickory over the present hard-surface road from Newton to Hickory.*"

This finding of fact by the trial judge was without objection or exception so far as the record discloses. Indeed, from the admissions contained in the defendant's answer, referred to, the trial judge could not have found otherwise.

So that from this record it appears that the southern route was admittedly shown on the map and that it entered the town of Newton in its southeastern limits and passed by the courthouse and along the principal street through the center of the town and thence to Hickory. The courthouse, the principal street, and the center of a county seat is a fixed and definite locality. It being admitted by the defendant that the highway running by the courthouse and along the principal street and through the center of the town was shown on the map which was a part of the Road Act of 1921, therefore, the Court in its opinion held that "the statute, speaking through a map, made the connection in a definite and certain manner. What the statute hath joined together the defendant cannot put asunder."

I am of the opinion that this proposition is sound and in accordance with the meaning of the law.

The State-wide System of Highways created by the Act of 1921 was not designed for the sole and exclusive purpose of serving through travel, but rather to serve the general public, and the county seats and principal towns of the State constituted important units of the general public which the law did not intend should be sidetracked.

As stated in the opinion, the sole and only question presented in this case is whether or not the proposed road disconnected the town of Newton from the highway system. From the admissions made in

the answer of the defendant and the findings of fact by the trial judge, the law, through the map, connected the town, by a highway entering at the southeastern limits and passing by the courthouse, along the principal street, and through the center of the town. Therefore the law, having connected the town by locating a highway through its corporate limits in a definite and certain place, the town is entitled to the service of the connection substantially as fixed by the Legislature. This conclusion was expressed thus by the Court: "We conclude that the Road Act itself connected the county seats according to the best judgment of the Legislature. A substantial departure from such connection, so made by the sovereign power of the State, must, of necessity, constitute a disconnection."

After a careful and diligent examination of the record as presented and the question of law involved, I am of the opinion that the case has been properly decided and therefore the petition to rehear is denied.

The foregoing is in no way binding on the Court. It is simply a statement of my conclusions on the petition to rehear and is intended as a memorandum of the reason why I think the petition should be denied.

Petition denied.

RULES OF PRACTICE

IN THE

SUPREME COURT OF NORTH CAROLINA

REVISED AND ADOPTED FALL TERM, 1926

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RULES

1. APPLICANTS FOR LICENSE TO PRACTICE LAW.

Applicants for license to practice law will be examined on the last Monday in January and Monday preceding the last Monday in August of each year, and at no other time. All examinations will be in writing.

2. COURSE OF STUDY PRESCRIBED FOR APPLICANTS FOR LICENSE TO PRACTICE LAW.

Each applicant must have attained the age of 21 years, or will arrive at that age before the time for the next examination, and must have studied:

Constitution of United States;
Constitution of North Carolina;
Creasy's English Constitution;
Shepard's Constitutional Text-book;
Cooley's Principles of Constitutional Law;
Blackstone's Commentaries, as contained in vol. 1 of Ewell's Essentials of the Law;
Bispham's Equity;
Sharswood's Legal Ethics;
Consolidated Statutes N. C. (vol. 1).

Also some approved text-book on:

Agency,	Evidence,
Bailments,	Executors,
Carriers,	Negotiable Instruments,
Corporations,	Partnership,
Contracts,	Sales.

(1) *Requirements of Applicants for Law License.* Applicants must have studied the course prescribed for two years at least, and shall file with the clerk a certificate of good moral character signed by two members of the bar who are practicing attorneys of this Court, and also a certificate of the dean of a law school or a member of the bar of this Court, that the applicant has read law under his instruction, or to his knowledge or satisfaction, for two years, and upon examination by such instructor has been found competent and proficient in said course. Such certificate, while indispensable, will of course not be conclusive evidence of proficiency. An applicant from another State may file a certificate of good moral character signed by any State official of the State in which he resides. If the applicant has been licensed to practice law in another State, but is not entitled to be admitted in this State under Rule 3, based on the act of 1920, such applicant may file in lieu of the

certificate of proficiency and time of study the law license which has been issued to him, with leave to withdraw the same after he has been examined. The foregoing certificates as to character and proficiency, and also $23.50, must be deposited with the clerk not later than Tuesday noon preceding the day of examination. The applicant in filing his certificates, which may be done personally or by mail, must give the clerk the applicant's full name and permanent postoffice address. If the applicant shall fail to entitle himself to receive a license, $22 of the money deposited by him (the $20 required by the statute and $2 price of parchment) shall be returned to him, but the $1.50 registration fee required by the statute shall be retained by the clerk.

In re Applicants for License, 191—235, and 143—1.

3. NONRESIDENT LAWYERS—WHEN ADMITTED.

Any person duly licensed to practice law in another state may be licensed to practice law in this State without examination, if attorneys who are licensed in this State may be licensed without examination in the state from which he comes, upon said applicant furnishing to the Supreme Court a certificate from a member of the court of last resort of such state that he is duly licensed to practice law therein, and that he has been actively engaged in the practice of law for five years or more, and is of good moral character and a proper person to be licensed to practice law, together with a certificate from two practicing attorneys of such state, practicing in said court of last resort, as to the applicant's good moral character, whose signatures shall be attested by the clerk of said Court, and upon said applicant satisfying the Court that he is a bona fide resident and citizen of North Carolina, or intends immediately to become such: *Provided further,* that said applicant shall be required to deposit with the clerk of the Supreme Court the same amount required of applicants who stand the examination. (Ch. 44, Public Laws, Extra Session, 1920.) And such nonresident lawyer must comply with all preliminary requirements of application for license not later than noon of Tuesday preceding the day of examination.

3½. NOTICE OF INTENTION TO APPLY FOR LICENSE.

As a condition precedent to his right to apply for license, every applicant for license to practice law in this State, either under the Comity Act or by taking the prescribed examination, shall notify the clerk of his intention to become an applicant at least thirty days prior to the day of examination. Immediately upon receipt of such notice, the clerk shall furnish said applicant with blank forms for his certificates, as required by Rules 2 and 3. The names of those who have thus signified their intention of becoming applicants for license to practice

law shall be open to inspection in the clerk's office during the thirty-day period prior to the examination. This notice to the clerk is not in lieu of, but in addition to, the requirements relating to certificates of proficiency and good moral character.

3½(a). PROTESTS—WHEN AND HOW MADE.

Protest against the issuance of license in any case may be filed with the clerk on or before Saturday noon preceding the day of examination; and the applicant, so protested, shall be notified of such action immediately upon receipt of same, but the protest shall not be made public by the clerk unless and until said applicant shall have successfully passed the examination or met every other requirement necessary to the issuance of license. Any protested applicant may withdraw his application for license to practice law in this State at any time prior to tendering his paper for examination or his credentials for approval under the Comity Act, and, in which event, the protest will not be heard. But upon the tender of a satisfactory examination paper or satisfactory credentials under the Comity Act in the face of a protest, the matter then passes beyond the control of such applicant, and the Court will set a day for the hearing of said protest, first giving the protested applicant an opportunity to answer the charges preferred against him by issuing notices to all interested parties of the hearing.

In re Applicants for License, 191—235.
In re Dillingham, 188—162.

3½(b). REAPPLICATION FOR LICENSE NOT TO BE MADE IN TWO YEARS FOLLOWING DENIAL FOR WANT OF UPRIGHT CHARACTER.

When an applicant has been denied license to practice law in this State on the ground of want of upright or good moral character as required by the statute, said applicant shall not be permitted to apply again for such license until two years have elapsed following the date of application which has been denied.

4. APPEALS—HOW DOCKETED.

Each appeal shall be docketed from the judicial district to which it properly belongs, and appeals in criminal cases from each district shall be placed at the head of the docket for the district. Appeals in both civil and criminal cases shall be docketed each in its own class, in the order in which they are filed with the clerk.

5. APPEALS—WHEN HEARD.

The transcript of the record on appeal from a judgment rendered before the commencement of a term of this Court must be docketed at

such term fourteen days before entering upon the call of the docket of the district to which it belongs, and stand for argument in its order; if not so docketed, the case shall be continued or dismissed under Rule 17, if the appellee file a proper certificate prior to the docketing of the transcript.

The transcript of the record on appeal from a court in a county in which the court shall be held during the term of this Court may be filed at such term or at the next succeeding term. If filed fourteen days before the Court begins the perusal of the docket of the district to which it belongs, it shall be heard in its order; otherwise, if a civil case, it shall be continued, unless by consent it is submitted upon printed argument under Rule 10.

Appeals in criminal cases shall each be heard at the term at which they are docketed, unless for cause or by consent they are continued: *Provided, however*, that an appeal in a civil case from the First, Second, Third and Fourth districts which is tried between first day of January and the first Monday in February, or between first day of August and fourth Monday in August, is not required to be docketed at the immediately succeeding term of this Court, though if docketed in time for hearing at said first term, the appeal will stand regularly for argument.

S. v. Surety Co., 192—52.
Stone v. Ledbetter, 191—777.
Trust Co. v. Parks, 191—263.
Finch v. Comrs., 190—154.

6. APPEALS—CRIMINAL ACTIONS.

Appeals in criminal cases, docketed fourteen days before the call of the docket for their districts, shall be heard before the appeals in civil cases from said districts. Criminal appeals docketed after the time above stated shall be called immediately at the close of argument of appeals from the Twentieth District, unless for cause otherwise ordered, and shall have priority over civil cases placed at the end of the docket.

(1) *Appeal Bond.* If a justified appeal bond (except in pauper appeals) is not filed with the transcript, as required by section 647, Consolidated Statutes, the appeal will be dismissed.

(2) *Pauper Appeals.* See Rule 22.

(3) *When Appeal Abates.* See Rule 37.

(4) *Appeal Dismissed if Transcript Not Printed or Mimeographed.* See Rule 24.

S. v. Farmer, 188—243.
S. v. Johnson, 183—730.
S. v. Trull, 169—364.

7. CALL OF JUDICIAL DISTRICTS.

Appeals from the several districts will be called for hearing on Tuesday of the week to which the district is allotted, as follows:

From the First District, the first week of the term.

From the Second District, the second week of the term.

From the Third and Fourth districts, the third week of the term.

From the Fifth District, the fourth week of the term.

From the Sixth District, the fifth week of the term.

From the Seventh District, the sixth week of the term.

From the Eighth and Ninth districts, the seventh week of the term.

From the Tenth District, the eighth week of the term.

From the Eleventh District, the ninth week of the term.

From the Twelfth District, the tenth week of the term.

From the Thirteenth District, the eleventh week of the term.

From the Fourteenth District, the twelfth week of the term.

From the Fifteenth and Sixteenth districts, the thirteenth week of the term.

From the Seventeenth and Eighteenth districts, the fourteenth week of the term.

From the Nineteenth District, the fifteenth week of the term.

From the Twentieth District, the sixteenth week of the term.

Where two districts are allotted to one week, the cases will be docketed in the order in which they are received by the clerk, but the cases in the later district in number will not be called before Wednesday of said week, but cases from the later district in number must nevertheless be docketed not later than fourteen days preceding the call for the week.

8. END OF DOCKET.

At the Spring Term, causes not reached and disposed of during the period allotted to each district, and those for any other cause put to the foot of the docket, shall be called at the close of argument of appeals from the Twentieth District, and each cause, in its order, tried or continued, subject to Rule 6.

At the Fall Term, appeals in criminal cases only will be heard at the end of the docket, unless the Court for special reason shall set a civil appeal to be heard at the end of the docket at that term. At either term the Court in its discretion may place cases not reached on the call of a district at the end of some other district.

9. CALL OF DOCKET.

Each appeal shall be called in its proper order. If any party shall not be ready, the cause, if a civil action, may be put to the foot of the district, by the consent of the counsel appearing, or for cause shown,

and be again called when reached, if the docket shall be called a second time; otherwise, the first call shall be peremptory; or at the first term of the Court in the year a cause may, by consent of the Court, be put to the foot of the docket; if no counsel appear for either party at the first call, it will be put to the end of the district, unless a printed brief is filed by one of the parties; and if none appear at the second call, it will be continued, unless the Court shall otherwise direct. Appeals in criminal actions will be called peremptorily for argument on the first call of the docket, unless for good cause assigned.

10. SUBMISSION ON PRINTED ARGUMENTS.

By consent of counsel, any case may be submitted without oral argument, upon printed briefs by both sides, without regard to the number of the case on the docket, or date of docketing the appeal. Such consent must be signed by counsel of both parties and filed, and the clerk shall make a note thereof on the docket; but the Court, notwithstanding, may direct an oral argument to be made, if it shall deem best.

An appeal submitted under this rule must be docketed before the call of appeals from the Nineteenth District has been entered upon, unless it appears to the Court from the record that there has been no delay in docketing the appeal, and that it has been docketed as soon as practicable, and that public interest requires a speedy hearing of the case.

(NOTE—A compliance with this rule does not require a formal motion, but merely the filing with the printed record and briefs an agreement signed by counsel for both sides, that the case may be considered without oral argument.)

11. BRIEFS NOT RECEIVED AFTER ARGUMENT.

When the case is argued orally on the regular call of the docket, in behalf of only one of the parties, no printed argument for the other party will be received, unless it is filed before the oral argument begins. No brief or argument will be received after a case has been argued or submitted, except upon leave granted in open court, after notice to opposing counsel.

12. BRIEFS REGARDED AS PERSONAL APPEARANCE.

When a case is reached on the regular call of the docket, and a printed brief or argument shall be filed for either party, the case shall stand on the same footing as if there were a personal appearance by counsel.

13. WHEN CASE MAY BE HEARD OUT OF ORDER.

In cases where the State is concerned, involving or affecting some matter of general public interest, the Court may, upon motion of the

Attorney-General, assign an earlier place on the calendar, or fix a day for the argument thereof, which shall take precedence of other business. And the Court, at the instance of a party to a cause that directly involves the right to a public office, or at the instance of a party arrested in a civil action who is in jail by reason of inability to give bond or from refusal of the court to discharge him, or in other cases of sufficient importance, in its judgment, may make the like assignment in respect to it.

14. WHEN CASES MAY BE HEARD TOGETHER.

Two or more cases involving the same question may, by order of the Court, be heard together, but they must be argued as one case, the Court directing, when the counsel disagree, the course of argument.

15. APPEAL DISMISSED IF NOT PROSECUTED.

Cases not prosecuted for two terms shall, when reached in order at the third term, be dimissed at the cost of appellant, unless the same, for sufficient cause, shall be continued. When so dismissed, the appellant may, at any time thereafter, not later than during the week allotted to the district to which it belongs at the next succeeding term, move to have the same reinstated, on notice to the appellee and showing sufficient cause.

16. MOTION TO DISMISS APPEAL—WHEN MADE.

A motion to dismiss an appeal for noncompliance with the requirements of the statute in perfecting an appeal must be made at or before entering upon the trial of the appeal upon its merits, and such motion will be allowed unless such compliance be shown in the record, or a waiver thereof appear therein, or such compliance is dispensed with by a writing signed by the appellee or his counsel, to that effect, or unless the Court shall allow appropriate amendments.

17. APPEAL DISMISSED FOR FAILURE TO DOCKET IN TIME.

If the appellant in a civil action shall fail to bring up and file a transcript of the record fourteen days before the Court begins the call of cases from the district from which it comes at the term of this Court at which such transcript is required to be filed, the appellee may file with the clerk of this Court the certificate of the clerk of the court from which the appeal comes, showing the names of the parties thereto, the time when the judgment and appeal were taken, the name of the appellant, and the date of the settling of the case on appeal, if any has been settled, with his motion to docket and dismiss at appellant's cost said appeal, which motion shall be allowed at the first session of the

Court thereafter, with leave to the appellant, during the term, and after notice to the appellee, to apply for the redocketing of the cause: *Provided,* that such motion of appellee to docket and dismiss the appeal will not be considered unless the appellee, before making the motion to dismiss, has paid the clerk of this Court the fee charged by the statute for docketing an appeal, the fee for drawing and entering judgment, and the determination fee, execution for such amount to issue in favor of appellee against appellant.

(1) *Appeal Docketed by Appellee When Frivolous and Taken for Purposes of Delay.* The transcript of an appeal which is obviously frivolous and appears to have been taken only for purposes of delay, may be docketed in this Court by appellee before the time required by Rule 5, and if it appears to the Court that the appellee's contention is correct, the appeal will be dismissed at cost of appellant.

(NOTE—Motion made under this rule is not effectual if filed after appeal has been docketed, although appeal was docketed after time required by Rule 5.)

Carroll v. Mfg. Co., 180—660.
Cox v. Lumber Co., 177—227.
Johnson v. Covington, 178—658.
Murphy v. Electric Co., 174—782.
McNeill v. R. R., 173—730.
Gupton v. Sledge, 161—213.

Frivolous Appeals Dismissed:

Ross v. Robinson, 185—548.
Hotel Co. v. Griffin, 182—539.
Leroy v. Saliba, 180—15.
Headman v. Comrs., 177—261.
Blount v. Jones, 175—708.
Ludwick v. Mining Co., 171—415.

18. APPEAL DOCKETED AND DISMISSED NOT TO BE REINSTATED UNTIL APPELLANT HAS PAID COSTS.

When an appeal is dismissed by reason of the failure of the appellant to bring up a transcript of the record, and the same, or a certificate for that purpose, as allowed by Rule 17, is procured by appellee, and the case dismissed, no order shall be made setting aside the dismissal or allowing the appeal to be reinstated, even though the appellant may be otherwise entitled to such order, until the appellant shall have paid or offered to pay the costs of the appellee in procuring the certificate and in causing the same to be docketed.

19. TRANSCRIPTS.

(1) *What to Contain and How Arranged.* In every transcript record of an action brought to this Court, the proceedings shall be set forth in the order of time in which they occurred, and the several processes, orders, and every document constituting the transcript shall be identified by a proper title or heading, and shall be arranged to follow each other in the order the same took place, when practicable. The pages shall be numbered, and on the front page of the record there shall be an index in the following or some equivalent form:

	PAGE
Summons—date	1
Complaint—first cause of action	2
Complaint—second cause of action	3
Affidavit for attachment, etc.	4

It shall not be necessary to send as a part of the transcript, affidavits, orders, and other process and proceedings in the action not involved in the appeal and not necessary to an understanding of the exceptions relied on. Counsel may sign an agreement which shall be made a part of the record as to the parts to be transcribed, and in the event of disagreement of counsel the judge of the Superior Court shall designate the same by written order: *Provided*, that the pleadings on which the case is tried, the issues, and the judgment appealed from shall be a part of the transcript in all cases: *Provided further*, that this rule is subject to the power of this Court to order additional papers and parts of the record to be sent up.

Cressler v. Asheville, 138—482.
Sigmon v. R. R., 135—181.
Jones v. Hoggard, 107—349.

(2) *Two Appeals.* When there are two or more appeals in one action it shall not be necessary to have more than one transcript, but the statements of cases on appeal shall be settled as now required by law, and shall appear separately in the transcript. The judge of the Superior Court shall determine the part of the costs of making the transcript to be paid by each party, subject to the right to recover such costs in the final judgment as now provided by law.

Pope v. Lumber Co., 162—208.
Mills v. Guaranty Co., 136—255.

(3) *Exceptions Grouped.* All exceptions relied on shall be grouped and separately numbered immediately before or after the signature to the case on appeal. Exceptions not thus set out will be deemed to be abandoned. If this rule is not complied with, and the appeal is not from a judgment of nonsuit, it will be dismissed, or the Court will in its

discretion refer the transcript to the clerk or to some attorney to state the exceptions according to this rule, for which an allowance of not less than $5 will be made, to be paid in advance by the appellant; but the transcript will not be so referred or remanded unless the appellant file with the clerk a written stipulation that the appeal shall be heard and determined on printed briefs under Rule 10, if the appellee shall so elect.

Ullery v. Guthrie, 148—418.
Davis v. Wall, 142—450.
Hicks v. Kenan, 139—337.
Brinkley v. Smith, 130—224.
Jones v. R. R., 153—421, *Porter v. Lumber Co.,* 164—396, and *Thresher Co. v. Thomas,* 170—680, suggest how assignments should be made.

(4) *Evidence to be Stated in Narrative Form.* The evidence in case on appeal shall be in narrative form, and not by question and answer, except that a question and answer, or a series of them, may be set out when the subject of a particular exception. When this rule is not complied with, and the case on appeal is settled by the judge, this Court will in its discretion hear the appeal, or remand for a settlement of the case to conform to this rule. If the case is settled by agreement of counsel, or the statement of the appellant is the case on appeal, and the rule is not complied with, or the appeal is from a judgment of nonsuit, the appeal will be dismissed. In other cases the Court will in its discretion dismiss the appeal, or remand for a settlement of the case on appeal.

Brewer v. Mfg. Co., 161—211.
Skipper v. Lumber Co., 158—322.

(5) *Unnecessary Portions of Transcript—How Taxed.* The cost of copying and printing unnecessary and irrelevant testimony, or any other matter not needed to explain the exceptions or errors assigned, and not constituting a part of the record proper, shall in all cases be charged to the appellant, unless it appears that they were sent up at the instance of the appellee, in which case the cost shall be taxed against him.

(6) *Transcripts in Pauper Appeals.* See Rule 22.

(7) *Maps.* Seven copies of every map or diagram which is a part of the transcript of appeal, and which is applicable to the merits of the appeal, shall be filed with the clerk of this Court before such appeal is called for argument.

(8) *Appeal Bond.* See Rule 6 (1).

(9) The prosecution bond given in every case shall be sent up with the transcript of the record. Such bond shall be justified and the justification shall name the county wherein the surety resides.

(10) *Insufficient Transcript.* If a transcript has not been properly arranged, as required by subsection (1) of this rule, the appeal shall be dismissed or referred to the clerk to be properly arranged, for which an allowance of $5 shall be made to him. If the appeal is not dismissed, and is so referred to the clerk, it shall be placed for hearing at the end of the district, or the end of the docket, or continued as the Court may deem proper.

20. PLEADINGS.

(1) *When Deemed Frivolous.* Memoranda of pleadings will not be received or recognized in the Supreme Court as pleadings, even by consent of counsel, but the same will be treated as frivolous and impertinent.

(2) *When Containing More Than One Cause of Action.* Every pleading containing two or more causes of action shall, in each, set out all the facts upon which it rests, and shall not, by reference to others, incorporate in itself any of the allegations in them, except that exhibits, by marks or numbers, may be referred to without reciting their contents, when attached thereto.

(3) *When Scandalous.* Pleadings containing scandalous or impertinent matter will, in a plain case, be ordered by the Court to be stricken from the record, or reformed; and for this purpose the Court may refer it to the clerk, or some member of the bar, to examine and report the character of the same.

(4) *Amendments.* The Court may amend any process, pleading, or proceeding, either in form or substance, for the purpose of furthering justice, on such terms as shall be deemed just, at any time before final judgment, or may make proper parties to any case, where the Court may deem it necessary and proper for the purpose of justice, and on such terms as the Court may prescribe.

21. EXCEPTIONS. (See, also, Rule 19 (3).

Every appellant shall set out in his statement of case served on appeal his exceptions to the proceedings, ruling, or judgment of the court, briefly and clearly stated and numbered. When no case settled is necessary, then, within ten days next after the end of the term at which the judgment is rendered from which an appeal shall be taken, or, in case of a ruling of the court at chambers and not in term-time, within ten days after notice thereof, appellant shall file the said exceptions in the office of the clerk of the court below. No exception not thus set out, or filed and made a part of the case or record, shall be considered by this Court, other than exceptions to the jurisdiction, or because the complaint does not state a cause of action, or motions in arrest for the insufficiency of an indictment. When testimony is admitted, not as substantive evidence,

but in corroboration or contradiction, and that fact is stated by the court when it is admitted, it will not be ground for exception that the judge fails in his charge to again instruct the jury specially upon the nature of such evidence, unless his attention is called to the matter by a prayer for instruction; nor will it be ground of exception that evidence competent for some purposes but not for all, is admitted generally, unless the appellant asks, at the time of admission, that its purpose shall be restricted.

See C. S., 590, and annotations thereunder.

22. PRINTING TRANSCRIPTS. (But see Rule 25.)

Twenty-five copies of the transcript in every case docketed, except in pauper appeals, shall be printed and filed immediately after the case has been docketed, unless printed before the case has been docketed, in which event the printed copies shall be filed when the case is docketed. It shall not be necessary to print the summons and other papers showing service of process, if a statement signed by counsel is printed giving the names of all the parties and stating that summons has been duly served. Nor shall it be necessary to print formal parts of the record showing the organization of the court, the constitution of the jury, etc.

In pauper appeals the counsel for appellant may file seven typewritten copies of his brief, in lieu of printed copies, if he so elects, and such briefs must give a succinct statement of the facts applicable to the exceptions and the authorities relied on, and in pauper appeals the appellant may also file, in lieu of printed copies, if he so elects, seven typewritten copies of the transcript, in addition to the original transcript. Should the appellant gain the appeal, the cost of preparing the typewritten briefs or transcripts shall be taxed against the appellee, provided statement of such cost is given the clerk of this Court before the case is decided. The arrangement of the matter in the printed transcript shall follow the order prescribed by Rule 19.

Trust Co. v. Miller, 191—787.
Estes v. Rash, 170—341.

23. HOW PRINTED.

The transcript on appeal shall be printed under the direction of the clerk of this Court, and in the same type and style, and pages of same size as the reports of this Court, unless it is printed before the appeal is docketed in the required style and manner. If it is to be printed here the appellant or the party sending up the appeal shall send therewith to the clerk of this Court a cash deposit, sufficient to cover the cost of printing, which shall include 10 cents per page for the clerk of this Court, to recompense him for his services in preparing the transcript in proper shape for the printer.

When it appears that the clerk has waived the requirement of a cash deposit by appellant to cover estimated cost of printing, and the cost of printing has not been paid when the case is called for argument, the Court will in its discretion, on motion of counsel for appellee or a statement by the clerk, dismiss the appeal.

24. APPEAL DISMISSED IF TRANSCRIPT NOT PRINTED.

If the transcript on appeal (except in pauper appeals) shall not be printed or mimeographed as required by the rules, by reason of the failure of the appellant to send up the transcript or deposit the cost therefor in time for it to be printed, when called in its regular order (as set out in Rule 5), the appeal shall, on motion of appellee, be dismissed; but the Court may, on motion of appellant, after five days notice, at the same term, for good cause shown, reinstate the appeal, to be heard at the next term. When a cause is called and the record is not fully printed, if the appellee does not move to dismiss, the cause will be continued. The Court will hear no cause in which the rule as to printing is not complied with, other than pauper appeals.

25. MIMEOGRAPHED RECORDS AND BRIEFS.

Counsel may file in lieu of printed records and briefs 25 mimeographed copies thereof, to be prepared under the immediate supervision and direction of the clerk of this Court, the cost of such copies not to exceed $1.10 per page of an average of 40 lines and 400 words to the page: *Provided, however,* that it shall be permissible and optional with counsel to file printed transcripts and briefs when it is possible to print such documents without unnecessary delay and inconvenience to the Court and appellee's counsel, and within time for an appeal to be heard in its regular order under Rule 5.

The clerk of this Court is required to purchase the stencil sheets, arrange all matter to be mimeographed for the operator, to supervise the work, to carefully read the proof, and to index the mimeographed transcripts and mail copies promptly to counsel. A cash deposit covering estimated cost of this work is required as in Rule 23 under the same penalty as therein prescribed for failure to pay the account due for such work.

26. COST OF PRINTING AND MIMEOGRAPHING TRANSCRIPTS AND BRIEFS TO BE RECOVERED.

The actual cost of printing the transcript of appeal and of the brief shall be allowed the successful litigant, not to exceed $1.50 per page, and not exceeding sixty pages for a transcript and twenty pages for a brief, unless otherwise specially ordered by the Court, and he shall be allowed 10 cents additional for each such page paid to the clerk of this Court

for making copy for the printer, unless the transcript was printed before the case was docketed.

Judge and counsel should not encumber the "case on appeal" with evidence or with matters not pertinent to the exceptions taken. When the case is settled, either by the judge or the parties, if either party deems that unnecessary matter is incorporated, he shall have his exception noted, designating the parts deemed unnecessary, and if, upon hearing the appeal, the Court finds that such parts were in fact unnecessary, the cost of making the transcript of such unnecessary matter and of printing the same shall be taxed against the party at whose instance it was incorporated into the transcript, as required by Rule 22, no matter in whose favor the judgment is given here, except when such party has already paid the expense of such unnecessary matter, and in that event he shall not recover it back, though successful on his appeal. Motions for taxation of costs for copying and printing unnecessary parts sent up in the manuscript shall be decided without argument.

A successful litigant shall recover the actual cost of mimeographing a transcript or brief, not to exceed sixty pages of a transcript and twenty pages of a brief, unless otherwise ordered as herein provided in this rule.

27. Briefs.

Twenty-five printed or mimeographed copies of briefs of both parties shall be filed in all cases (except in pauper appeals, as provided in Rule 22). Such briefs may be sent up by counsel ready printed, or they may be printed or mimeographed under the supervision of the clerk of this Court if a proper deposit for cost is made, as specified in Rule 23. They must be of the size and style prescribed by such rule. The briefs are expected to cover all the points presented in the oral argument, though additional authorities may be cited, if discovered after brief is filed, by furnishing list to opposing counsel and handing memorandum of same to the Marshal to be placed by him with the papers in the case, but counsel will not be permitted to consume time on the argument in the citation of additional authorities.

27½. Statement of the Questions Involved.

The first page of appellant's brief, other than formal matters appearing thereon, shall be used exclusively for a succinct statement of the question or questions involved on the appeal. Such statement should not ordinarily exceed fifteen lines, and should never exceed one page. This will then be followed on the next page by a recital of the facts and the argument as required by the other rules. In case of disagreement as to the exact question or questions presented for determination, the appellee may submit a counter-statement, using the first page of appellee's brief for this purpose. But no counter-statement need be made

unless appellee thinks appellant's statement is inaccurate, or that it does not present the points for decision in a proper light.

The statement of the questions involved or presented by the appeal, is designed to enable the Court, as well as counsel, to obtain an immediate view and grasp of the nature of the controversy; and a failure to comply with this rule may result in a dismissal of the appeal.

28. APPELLANT'S BRIEF.

The brief of appellant shall set forth a succinct statement of the facts necessary for understanding the exceptions, except as to an exception that there was no evidence, it shall be sufficient to refer to pages of printed transcript containing the evidence. Such brief shall contain, properly numbered, the several grounds of exception and assignments of error with reference to printed pages of transcript, and the authorities relied on classified under each assignment; and if statutes are material, the same shall be cited by the book, chapter, and section. Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him. Such briefs when filed shall be noted by the clerk on the docket, and a copy thereof furnished by him to opposite counsel on application.

Appellant shall, upon delivering a copy of his manuscript brief to the printer to be printed or to the clerk of this Court to be printed or mimeographed, immediately mail or deliver to appellee's counsel a carbon typewritten copy thereof. If the printed or mimeographed copies of appellant's brief have not been filed with the clerk of this Court, and no typewritten copy has been delivered to appellee's counsel by 12 o'clock noon on Tuesday of the week preceding the call of the district to which the case belongs, the appeal will be dismissed on motion of appellee, when the call of that district is begun, unless for good cause shown the Court shall give further time to print the brief.

Phillips v. Junior Order, 175—133.
S. v. Bryson, 173—803.
S. v. Smith, 164—475.
Campbell v. Sigman, 170—348.
Estes v. Rash, 170—341.
"Pass briefs" disapproved: *Jones v. R. R.,* 164—392.

29. APPELLEE'S BRIEF.

The appellee shall file 25 printed or mimeographed briefs with the clerk of this Court by noon of Saturday preceding the call of the district to which the case belongs and the same shall be noted by the clerk on his docket and a copy furnished by the clerk, on application, to counsel for

appellant. It is not required that the appellee's brief shall contain a statement of the case. On failure of the appellee to file his brief by the time required, the cause will be heard and determined without argument from appellee unless for good cause shown the Court shall give appellee further time to file his brief.

30. ARGUMENTS.

(1) The counsel for the appellant shall be entitled to open and conclude the argument.

(2) Counsel for appellant may be heard ten minutes for statement of case and thirty minutes in argument.

(3) Counsel for appellee may be heard for thirty minutes.

(4) The time for argument may be extended by the Court in a case requiring such extension, but application for extension must be made before the argument begins. The Court, however, may direct the argument of such points as it may see fit outside of the time limited.

(5) Any number of counsel may be heard on either side within the limit of the time above specified; but if several counsel shall be heard, each must confine himself to a part or parts of the subject-matter involved in the exceptions not discussed by his associate counsel, unless directed otherwise by the Court, so as to avoid tedious and useless repetition.

31. REARGUMENTS.

The Court will, of its own motion, direct a reargument before deciding any case, if in its judgment it is desirable.

32. AGREEMENTS OF COUNSEL.

The Court will not recognize any agreement of counsel in any case unless the same shall appear in the record, or in writing, filed in the cause in this Court.

33. APPEARANCES.

An attorney shall not be recognized as appearing in any case unless he be entered as counsel of record in the case. Upon his request, the clerk shall enter the name of such attorney, or he may enter it himself, thereby making him counsel of record for the party he may designate therein. Such appearance of counsel shall be deemed to be general in the case, unless a different appearance be indicated. Counsel of record are not permitted to withdraw from a case, except by leave of the Court.

34. CERTIORARI.

(1) *When Applied For.* Generally, the writ of certiorari, as a substitute for an appeal, must be applied for at the term of this Court to

which the appeal ought to have been taken, or, if no appeal lay, then before or to the term of this Court next after the judgment complained of was entered in the Superior Court. If the writ shall be applied for after that term, sufficient cause for the delay must be shown.

(2) *How Applied For.* The writs of *certiorari* and *supersedeas* shall be granted only upon petition, specifying the grounds of application therefor, except when a diminution of the record shall be suggested and it appears upon the face of the record that it is manifestly defective, in which case the writ of *certiorari* may be allowed, upon motion in writing. In all other cases the adverse party may answer the petition. The petition and answer must be verified, and the application shall be heard upon the petition, answer, affidavit, and such other evidence as may be pertinent.

(3) *Notice of.* No such petition or motion in the application shall be heard unless the petitioner shall have given the adverse party ten days notice, in writing, of the same; but the Court may, for just cause shown, shorten the time for such notice.

See C. S., 630 and annotations thereunder.

35. ADDITIONAL ISSUES.

If, pending the consideration of an appeal, the Supreme Court shall consider the trial of one or more issues of fact necessary to a proper decision of the case upon its merits, such issues shall be made up under the direction of the Court and certified to the Superior Court for trial, and the case will be retained for that purpose.

36. MOTIONS.

All motions made to the Court must be reduced to writing, and shall contain a brief statement of the facts on which they are founded, and the purpose of the same. Such motions, not leading to debate nor followed by voluminous evidence, may be made at the opening of the session of the Court.

37. ABATEMENT AND REVIVOR.

Whenever, pending an appeal to this Court, either party shall die, the proper representative in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in, and, on motion, be admitted to become parties to the action, and thereupon the appeal shall be heard and determined as in other causes; and if such representatives shall not so voluntarily become parties, then the opposing party may suggest the death upon the record, and thereupon, on motion, obtain an order that, unless such representatives shall become parties within the first five days of the ensuing term, the party moving for such

order shall be entitled to have the appeal dismissed; or, if the party moving shall be the appellant, he shall be entitled to have the appeal heard and determined according to the course of the Court: *Provided,* such order shall be served upon the opposing party.

When the death of a party is suggested, and the proper representatives of the deceased fail to appear by the fifth day of the term next succeeding such suggestion, and no action shall be taken by the opposing party within the time to compel their appearance, the appeal shall abate, unless otherwise ordered.

38. CERTIFICATION OF DECISIONS.

The clerk shall, on the first Monday in each month, transmit, by some safe hand, or by mail, to the clerks of the Superior Courts, certificates of the decisions of the Supreme Court which shall have been on file ten days, in cases sent from said court. Con. Stats., sec. 1417. But the Court in its discretion may order an opinion certified down at an earlier day. Upon final adjournment of the Court, the clerk shall at once certify to the Superior Courts all of the decisions not theretofore certified.

39. JUDGMENT AND MINUTE DOCKETS.

The judgment docket of this Court shall contain an alphabetical index of the names of the parties in favor of whom and against whom any judgment for costs or judgment interlocutory or upon the merits is entered. On this docket the clerk of the Court will enter a brief memorandum of every final judgment affecting the right to real property, and of every judgment requiring, in whole or in part, the payment of money, stating the names of the parties, the term at which such judgment was entered, its number on the docket of the Court; and when it shall appear from the return on the execution, or from an order for entry of satisfaction by this Court, that the judgment has been satisfied, in whole or in part, the clerk, at the request of any one interested in such entry, and on the payment of the lawful fee, shall make a memorandum of such satisfaction, whether in whole or in part, and refer briefly to the evidence of it.

The clerk shall keep a Permanent Minute-Book, containing a brief summary of the proceedings of this Court in each appeal disposed of.

40. CLERK AND COMMISSIONERS.

The clerk and every commissioner of this Court who, by virtue or under color of any order, judgment, or decree of the Supreme Court in any action or matter pending therein, has received or shall receive any money or security for money, to be kept or invested for the benefit of any party to such action or matter, or of any other person, shall, at the term

of said Court held next after the first day of January in each year, report to the Court a statement of said fund, setting forth the title and number of the action or matter, the term of the Court at which the order or orders under which the clerk of such commissioner professes to act was made, the amount and character of the investment, and the security for same, and his opinion as to the sufficiency of such security. In every subsequent report he shall state the condition of the fund and any change made in the amount or character of the investment, and every payment made to any person entitled thereto.

The reports required by the preceding paragraph shall be examined by the Court or some member thereof, and their or his approval indorsed shall be recorded in a well bound book, kept for the purpose, in the office of the clerk of the Supreme Court, entitled "Record of Funds," and the cost of recording the same shall be allowed by the Court and paid out of the fund. The report shall be filed among the papers of the action or matter to which the fund belongs.

41. LIBRARIAN.

(1) *Reports by Him.* The Librarian shall keep a correct catalogue of all books, periodicals, and pamphlets in the Library of the Supreme Court, and report to the Court on the first day of the Spring Term of each year what books have been added to the Library during the year next preceding his report, by purchase or otherwise, and also what books have been lost or disposed of, and in what manner.

(2) *Books Taken Out.* No book belonging to the Supreme Court Library shall be taken therefrom, except in the Supreme Court chamber, unless by the Justices of the Court, the Governor, the Attorney-General, or the head of some department of the executive branch of the State Government, without the special permission of the Marshal of the Court, and then only upon the application in writing of a judge of a Superior Court holding court or hearing some matter in the city of Raleigh, the President of the Senate, the Speaker of the House of Representatives, or the chairman of the several committees of the General Assembly; and in such cases the Marshal shall enter in a book kept for the purpose the name of the officer requiring the same, the name and number of the volume taken, when taken, and when returned.

42. COURT'S OPINIONS.

After the Court has decided a cause, the judge assigned to write it shall hand the opinion, when written, to the clerk, who shall cause five typewritten copies to be at once made and a copy sent in a sealed envelope to each member of the Court, to the end that the same may be carefully

examined, and the bearing of the authority cited may be considered prior to the day when the opinion shall be finally offered for adoption by the Court and ordered to be filed.

43. EXECUTIONS.

(1) *Teste of Executions.* When an appeal shall be taken after the commencement of a term of this Court, the judgment and teste of the execution shall have effect from the time of the filing of the appeal.

(2) *Issuing and Return of.* Executions issuing from this Court may be directed to the proper officers of any county in the State. At the request of a party in whose favor execution is to be issued, it may be made returnable on any specified day after the commencement of the term of this Court next ensuing its teste. In the absence of such request, the Clerk shall, within thirty days after the certificate of opinion is sent down, issue such execution to the county from which the cause came, making it returnable on the first day of the next ensuing term. The execution may, when the party in whose favor judgment is rendered shall so direct, be made returnable to the term of the Superior Court of said county held next after the date of its issue, and thereafter successive executions will only be issued from said Superior Court, and when satisfied, the fact shall be certified to this Court, to the end that an entry to this effect be made here.

Executions for the costs of this Court, adjudged against the losing party to appeals, may be issued after the determination of the appeal, returnable to a subsequent day of the term; or they may be issued after the end of the term, returnable, on a day named, at the next succeeding term of this Court.

The officer to whom said executions are directed shall be amenable to the penalties prescribed by law for failure to make due and proper return thereof.

44. PETITION TO REHEAR.

(1) *When Filed.* Petitions to rehear must be filed within forty days after the filing of the opinion in the case. No communication with the Court, or any Justice thereof, in regard to any such petition, will be permitted under any circumstances. No oral argument or other presentation of the cause to the Court, or any Justice thereof, by either party, will be allowed, unless on special request the Court shall so order.

(2) *What to Contain.* The petition must assign the alleged error of law complained of, or the matter overlooked, or the newly discovered evidence; and allege that the judgment complained of has been per-

formed or secured. Such petition shall be accompanied with the certificate of at least two members of the bar of this Court, who have no interest in the subject-matter and have never been of counsel for either party to the suit, and each of whom shall have been at least five years a member of the bar of this Court, that they have carefully examined the case and the law bearing thereon and the authorities cited in the opinion, and they shall summarize succinctly in such certificate the points in which they deem the opinion erroneous.

(3) *Two Copies to be Filed, How Endorsed.* The petitioner shall endorse upon the petition, of which he shall file two copies, the names of the two Justices, neither of whom dissented from the opinion, to whom the petition shall be referred by the clerk, and it shall not be docketed for rehearing unless both of said Justices endorse thereon that it is a proper case to be reheard: *Provided, however,* that when there have been two dissenting Justices, it shall be sufficient for the petitioner to file only one copy of the petition and designate only one Justice, and his approval in such case shall be sufficient to order the petition docketed.

The clerk shall, upon the receipt of a petition to rehear, immediately deliver a copy to each of the Justices to whom it is to be referred, unless the petition is received during a vacation of the Court, in which event it shall be delivered to the Justice designated by the petitioner on the first day of the next succeeding term of Court.

(4) *Justices to Act in Thirty Days.* The clerk shall enter upon the rehearing docket and upon the petition the date when the petition is filed in the clerk's office, the names of the Justices to whom the petitioner has requested that the petition be referred, and also the date when the petition is delivered to each of the Justices. The Justices will act upon the petition within thirty days after it is delivered to them, and the clerk is directed to report in writing to the Court in conference all petitions to rehear not acted on within the time required.

(5) *New Briefs to be Filed.* There shall be no oral argument before the Justices or Justice thus designated, before it is acted on by them, and if they order the petition docketed, there shall be no oral argument thereon before the Court (unless the Court of its own motion shall direct an oral argument), but it shall be submitted on the record at the former hearing the printed petition to rehear, and a brief to be filed by the petitioner within ten days after the petition is ordered to be docketed, and a brief to be filed by the respondent within twenty days after such order to docket. Such briefs shall not be the briefs on the first hearing, but shall be new briefs, directed to the errors assigned in the petition, and shall be printed. If not printed and filed in the prescribed time by the

petitioner, the petition will be dismissed, and for default in either particular by the respondent the cause will be disposed of without such brief.

(6) *When Petition Docketed for Rehearing.* The petition may be ordered docketed for a rehearing as to all points recited by the two certifying counsel (who cannot certify to errors not alleged in the petition), or it may be restricted to one or more of the points thus certified, as may be directed by the Justices who grant the application. When a petition to rehear is ordered to be docketed, notice shall at once be given by the clerk to counsel on both sides.

(7) *Stay of Execution.* When a petition to rehear is filed with the clerk of this Court, the Justice or Justices designated by the petitioner to pass upon it may, upon application and in his or their discretion, stay or restrain execution of the judgment or order until the certificate for a rehearing is either refused or, if allowed, until this Court has finally disposed of the case on the rehearing. Unless the party applying for the rehearing has already stayed execution in the court below, when the appeal was taken, by giving the required security, he shall, at the time of applying to the Justice or Justices for a stay, tender sufficient security for that purpose, which shall be approved by the Justice or Justices. Notice of the application for a stay must be given to the other party, if deemed proper by the Justice or Justices, for such time before the hearing of the application and in such manner as may be ordered. If a petition for a rehearing is denied, or if granted, and the petition is afterwards dismissed, the stay shall no longer continue in force, and execution may issue at once, or the judgment or order be otherwise enforced, unless, in case the petition is dismissed, the Court shall otherwise direct. When a stay is granted, the order shall run in the name of this Court and be signed and issued by the clerk, under its seal, with proper recitals to show the authority under which it was issued.

Cooper v. Comrs., 184—615.

See, also, annotations under C. S., 1419.

45. SITTINGS OF THE COURT.

The Court will sit daily, during the terms, Sundays and Mondays excepted, from 10 a.m. to 2 p.m., for the hearing of causes, except when the docket of a district is exhausted before the close of the week allotted to it. The Court will sit, however, on the first Monday of each term for the examination of applicants for license to practice law. (But see Rule 1.)

46. CITATION OF REPORTS.

Inasmuch as all the volumes of Reports prior to the 63rd have been reprinted by the State, with the number of the volume instead of the name of the reporter, counsel will cite the volumes prior to 63 N. C. as follows:

1 and 2 Martin, Taylor & Conf.	as	1	N. C.
1 Haywood	"	2	"
2 "	"	3	"
1 and 2 Car. Law Repository & N. C. Term	"	4	"
1 Murphey	"	5	"
2 "	"	6	"
3 "	"	7	"
1 Hawks	"	8	"
2 "	"	9	"
3 "	"	10	"
4 "	"	11	"
1 Devereux Law	"	12	"
2 " "	"	13	"
3 " "	"	14	"
4 " "	"	15	"
1 " Eq.	"	16	"
2 " "	"	17	"
1 Dev. & Bat. Law	"	18	"
2 " "	"	19	"
3 & 4 " "	"	20	"
1 Dev. & Bat. Eq.	"	21	"
2 " "	"	22	"
1 Iredell Law	"	23	"
2 " "	"	24	"
3 " "	"	25	"
4 " "	"	26	"
5 " "	"	27	"
6 " "	"	28	"
7 " "	"	29	"
8 " "	"	30	"
9 Iredell Law	as	31	N. C.
10 " "	"	32	"
11 " "	"	33	"
12 " "	"	34	"
13 " "	"	35	"
1 " Eq.	"	36	"
2 " "	"	37	"
3 " "	"	38	"
4 " "	"	39	"
5 " "	"	40	"
6 " "	"	41	"
7 " "	"	42	"
8 " "	"	43	"
Busbee Law	"	44	"
" Eq.	"	45	"
1 Jones Law	"	46	"
2 " "	"	47	"
3 " "	"	48	"
4 " "	"	49	"
5 " "	"	50	"
6 " "	"	51	"
7 " "	"	52	"
8 " "	"	53	"
1 " Eq.	"	54	"
2 " "	"	55	"
3 " "	"	56	"
4 " "	"	57	"
5 " "	"	58	"
6 " "	"	59	"
1 and 2 Winston	"	60	"
Phillips Law	"	61	"
" Eq.	"	62	"

In quoting from the *reprinted* Reports counsel will cite always the marginal (*i. e.*, the *original)* paging, except 1 N. C. and 20 N. C., which are repaged throughout, without marginal paging.

47. COURT RECONVENED.

The Court may be reconvened at any time after final adjournment by order of the Chief Justice, or, in the event of his inability to act, by one of the Associate Justices in order of seniority.

RULES OF PRACTICE

IN THE

NORTH CAROLINA SUPERIOR COURTS

REVISED AND ADOPTED BY THE JUSTICES OF THE SUPREME COURT

RULES

1. Entries on Records.

No entry shall be made on the records of the Superior Courts (the summons docket excepted) by any other person than the clerk, his regular deputy, or some person so directed by the presiding judge or the judge himself.

2. Surety on Prosecution Bond and Bail.

No person who is bail in any action or proceeding, either civil or criminal, or who is surety for the prosecution of any suit, or upon appeal from a justice of the peace, or is surety in any undertaking to be affected by the result of the trial of the action, shall appear as counsel or attorney in the same cause. And it shall be the duty of the clerks of the several Superior Courts to state, on the docket for the court, the names of the bail, if any, and surety for the prosecution in each case, or upon appeal from a justice of the peace. All prosecution bonds for any suit must be justified before the clerk of the Superior Court in a sum double the amount of the bond, and the justification must show that the surety is a resident of North Carolina, and must also show the county wherein the surety resides.

3. Opening and Conclusion.

In all cases, civil or criminal, when no evidence is introduced by the defendant, the right of reply and conclusion shall belong to his counsel.

4. Examination of Witnesses.

When several are employed on the same side, the examination, or cross-examination, of each witness shall be conducted by one counsel, but the counsel may change with each successive witness, or, with leave of the court, in a prolonged examination of a single witness. When a witness is sworn and offered, or when testimony is proposed to be elicited, to which objection is made by counsel of the opposing party, the counsel so offering shall state for what purpose the witness, or the evidence to be elicited, is offered; whereupon the counsel objecting shall state his objection and be heard in support thereof, and the counsel so offering shall be

heard in support of the competency of the witness and of the proposed evidence in conclusion, and the argument shall proceed no further, unless by special leave of the court.

5. Motion for Continuance.

When a party in a civil suit moves for a continuance on account of absent testimony, such party shall state, in a written affidavit, the nature of such testimony and what he expects to prove by it, and the motion shall be decided without debate, unless permitted by the court.

6. Decision of Right to Conclude Not Appealable.

In any case where a question shall arise as to whether the counsel for the plaintiff or the counsel for the defendant shall have the reply and the conclusion of the argument the court shall decide who is so entitled, and, except in the cases mentioned in Rule 3, its decision shall be final and not reviewable.

7. Issues.

Issues shall be made up as provided and directed in the Con. Stats., sec. 584.

8. Judgments.

Judgments shall be docketed as provided and directed in Con. Stats., secs. 613 and 614.

9. Transcript of Judgment.

Clerks of the Superior Courts shall not make out transcripts of the original judgment docket to be docketed in another county, until after the expiration of the term of the court at which such judgments were rendered.

10. Docketing Magistrate's Judgments.

Judgments rendered by a justice of the peace upon summons issued and returnable on the same day as the cases are successively reached and passed on, without continuance as to any, shall stand upon the same footing, and transcripts for docketing in the Superior Court shall be furnished to applicants at the same time after such rendition of judgment, and if delivered to the clerk of such court on the same day, shall create liens on real estate, and have no priority or precedence the one over the other, if all are, or shall be, entered within ten days after such delivery to said clerk.

11. Transcript to Supreme Court.

In every case of appeal to the Supreme Court, or in which a case is taken to the Supreme Court by means of the writ of *certiorari* as a sub-

stitute for an appeal, it shall be the duty of the clerk of the Superior Court, in preparing the transcript of the record for the Supreme Court, to set forth the proceedings in the action in the order of time in which they occurred, and the several processes or orders, and they shall be arranged to follow each other in order as nearly as practicable.

The pages of the transcript shall be plainly numbered, and there shall be written on the margin of each a brief statement of the subject-matter, opposite to the same. On the first page of the transcript of the record there shall be an index in the following or some equivalent form:

	PAGE
Summons—date	1
Complaint—first cause of action	2
Complaint—second cause of action	3
Affidavit of attachment	4

and so on to the end.

12. TRANSCRIPT ON APPEAL—WHEN SENT UP.

Transcripts on appeal to the Supreme Court shall be forwarded to that Court in twenty days after the case agreed, or case settled by the judge, is filed in office of clerk of the Superior Court. Con. Stats., sec. 645.

13. REPORTS OF CLERKS AND COMMISSIONERS.

Every clerk of the Superior Court, and every commissioner appointed by such court, who, by virtue or under color of any order, judgment, or decree of the court in any action or proceeding pending in it, has received or shall receive any money or security for money, to be kept or invested for the benefit of any party to such action, or of any other person, shall, at the term of such court held on or next after the first day of January in each year, report to the judge a statement of said fund, setting forth the title and number of the action, and the term of the court at which the order or orders under which the officer professes to act were made, the amount and character of the investment, and the security for the same, and his opinions as to the sufficiency of the security. In every report, after the first, he shall set forth any change made in the amount or character of the investment since the last report, and every payment made to any person entitled thereto.

The report required by the next preceding paragraph shall be made to the judge of the Superior Court holding the first term of the court in each and every year, who shall examine it, or cause it to be examined, and, if found correct, and so certified by him, it shall be entered by the clerk upon his book of accounts of guardians and other fiduciaries.

14. Recordari.

The Superior Court shall grant the writ of *recordari* only upon the petition of the party applying for it, specifying particularly the grounds of the application for the same. The petition shall be verified and the writ may be granted with or without notice; if with notice, the petition shall be heard upon answer thereto duly verified, and upon the affidavits and other evidence offered by the parties, and the decision thereupon shall be final, subject to appeal as in other cases; if granted without notice, the petitioner shall first give the undertaking for costs, and for the writ of *supersedeas*, if prayed for as required by the Revisal, sec. 584. In such case the writ shall be made returnable to the term of the Superior Court of the county in which the judgment or proceeding complained of was granted or had, and ten days notice in writing of the filing of the petition shall be given to the adverse party before the term of the court to which the writ shall be made returnable. The defendant in the petition, at the term of the Superior Court to which the said writ is returnable, may move to dismiss, or answer the same, and the answer shall be verified. The court shall hear the application at the return term thereof (unless for good cause shown the hearing shall be continued) upon the petition, answer, affidavits, and such evidence as the court may deem pertinent, and dismiss the same, or order the case to be placed on the trial docket according to law.

In proper cases the court may grant the writ of *certiorari* in like manner, except that in case of the suggestion of a diminution of the record, if it shall manifestly appear that the record is imperfect, the court may grant the writ upon motion in the cause.

15. Judgment—When to Require Bonds to be Filed.

In no case shall the court make or sign any order, decree, or judgment directing the payment of any money or securities for money belonging to any infant or to any person until it shall first appear that such person is entitled to receive the same and has given the bonds required by law in that respect, and such payments shall be directed only when such bonds as are required by law shall have been given and accepted by competent authority.

16. Next Friend—How Appointed.

In all cases where it is proposed that infants shall sue by their next friend, the court shall appoint such next friend, upon the written application of a reputable, disinterested person closely connected with such infant; but if such person will not apply, then upon the like application of some reputable citizen; and the court shall make such appointment only after due inquiry as to the fitness of the person to be appointed.

17. GUARDIANS AD LITEM—HOW APPOINTED.

All motions for a guardian *ad litem* shall be made in writing, and the court shall appoint such guardian only after due inquiry as to the fitness of the person to be appointed, and such guardian must file an answer in every case.

18. CASES PUT AT FOOT OF DOCKET.

All civil actions that have been at issue for two years, and that may be continued by consent at any term, will be placed at the end of the docket for the next term in their relative order upon the docket. When a civil action shall be continued on motion of one of the parties, the court may, in its discretion, order that such action be placed at the end of the docket, as if continued by consent.

19. WHEN OPINION IS CERTIFIED.

When the opinion of the Supreme Court in any cause which had been appealed to that Court has been certified to the Superior Court, such cause shall stand on the docket in its regular order at the first term after receipt of the opinion for judgment or trial, as the case may be, except in criminal actions in which the judgment has been affirmed. Con. Stats., sec. 4656.

20. CALENDAR.

When a calendar of civil actions shall be made under the supervision of the court, or by a committee of attorneys under the order of the court or by consent of the court, unless cause be shown to the contrary, all actions continued by consent, and numbered on the docket between the first and last numbers placed upon the calendar, will be placed at the end of the docket for the next term, as if continued by consent, if such actions have been at issue for two years.

21. CASES SET FOR A DAY CERTAIN.

Neither civil nor criminal actions will be set for trial on a day certain, or not to be called for trial before a day certain, unless by order of the court; and if the other business of the term shall have been disposed of before the day for which a civil action is set, the court will not be kept open for the trial of such action, except for some special reason apparent to the judge; but this rule will not apply when a calendar has been adopted by the court.

22. CALENDAR UNDER CONTROL OF COURT.

The court will reserve the right to determine whether it is necessary to make a calendar, and, also, for the dispatch of business, to make orders as to the disposition of causes placed upon the calendar and not reached on the day for which they may be set.

23. NONJURY CASES.

When a calendar shall be made, all actions that do not require the intervention of a jury, together with motions for interlocutory orders, will be placed on the motion docket, and the judge will exercise the right to call the motion docket at any time after the calendar shall be taken up.

24. APPEALS FROM JUSTICES OF THE PEACE.

Appeals from justices of the peace in civil actions will not be called for trial unless the returns of such appeals have been docketed ten days previous to the term, but appeals docketed less than ten days before the term may be tried by consent of parties.

25. ON CONSENT CONTINUANCE—JUDGMENT FOR COSTS.

When civil action shall be continued by consent of parties, the court will, upon suggestion that the charges of witnesses and fees of officers have not been paid, adjudge that the parties to the action pay respectively their own costs, subject to the right of the prevailing party to have such costs taxed in the final judgment.

26. TIME TO FILE PLEADINGS—HOW COMPUTED.

When time to file pleadings is allowed, it shall be computed from the adjournment of the court.

27. COUNSEL NOT SENT FOR.

Except for some unusual reason, connected with the business of the court, attorneys will not be sent for when their cases are called in their regular order.

28. CRIMINAL DOCKETS.

Clerks of the courts will be required, upon the criminal dockets prepared for the court and solicitor, to state and number the criminal business of the court in the following order:

First. All criminal causes at issue.

Second. All warrants upon which parties have been held to answer at that term.

Third. All presentments made at preceding terms, undisposed of.

Fourth. All cases wherein judgments *nisi* have been entered at the preceding term against defendants and their sureties, and against defaulting jurors or witnesses in behalf of the State.

29. CIVIL AND CRIMINAL DOCKETS—WHAT TO CONTAIN.

Clerks will also be required, upon both civil and criminal dockets, to bring forward and enter in different columns of sufficient space, in each case:

First. The names of the parties.

Second. The nature of the action.

Third. A summary history of the case, including the date of issuance of process, pleadings filed, and a brief note of all proceedings and orders therein.

Fourth. A blank space for the entries of the term.

30. BOOKS.

The clerks of the Superior Courts shall be chargeable with the care and preservation of the volumes of the Reports, and shall report at each term to the presiding judge whether any and what volumes have been lost or damaged since the last preceding term.

REMARKS OF CHIEF JUSTICE STACY FROM THE BENCH, TUESDAY, 17 MARCH, 1926, REGARDING THE DEATH OF FORMER ASSOCIATE JUSTICE, GEORGE H. BROWN.

Gentlemen of the Bar: Before proceeding with the usual work of the Court, we pause to express the sense of loss and sorrow which has come to us in common with all the people of the State, in the death of Judge George H. Brown, of Washington, N. C., formerly an Associate Justice of this Court. For sixteen years he bore the burden of intense judicial labor as a member of the Supreme Court and his opinions, always forceful and characterized by clearness and aptness of phrase, are to be found in forty-four volumes of our Reports, beginning with the 137th and ending with the 180th. The law of the State has been enriched by his untiring efforts, as both Bench and Bar will readily attest. His ripe learning and massive intellect, logical and orderly in its processes, were diligently employed, over a long period of time, in writing just judgments into the book of the law of a great people. For the profession he served so long and well, his work will stand as his monument. He wrought mightily in his day and has earned a lasting peace.

In recognition of his great work, the Court, when it adjourns today, will take its adjournment out of respect to his memory.

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ACTIONS. See Removal of Causes, 3; Judgments, 9; Bills and Notes, 6, 12; Appeal and Error, 24; Insurance 5, 21; Claim and Delivery, 2; Banks and Banking, 8, 19, 22; Municipal Corporations, 6; Process, 1; Estoppel, 1, 2; Fertilizers, 1; Contracts, 21; Executor and Administrator, 1, 2; Taxation, 6; Attachment, 5; Constitutional Law, 6; Corporations, 3.

1. *Actions—Cross-Actions—Counterclaim—Burden of Proof—Deeds and Conveyances.*—In a suit to remove a cloud on title to lands, the defendant setting up title by way of counterclaim or cross-action to part of the lands described in the plaintiff's complaint has the burden of proving his allegations in so far as they relate to the counterclaim. *Timber Co. v. Cozad*, 40.

2. *Actions—Joinder—Election—Principal and Agent—Parties.*—In an action for fraudulent misrepresentations the principal and agent making the misrepresentations are jointly and severally liable, and the plaintiff has his election to sue either jointly or severally, and plaintiff's motive for joinder, if he has clearly this right, is irrelevant. *Patton v. Fibre Co.*, 48.

3. *Actions—Misjoinder—Demurrer—Dismissal—Pleadings — Consent.* — A proceeding under the provisions of C. S., ch. 9, to establish the true dividing line between adjoining owners of land, will be dismissed upon demurrer for misjoinder of parties and causes of action that involve the title or interests of others not related to the matter in dispute, and which are entirely independent thereof. In this case it appearing that no demurrer had been interposed and that the answer had been filed, it is suggested that by consent of the parties they may proceed with their original controversy if so advised. *Rogers v. Rogers*, 50.

4. *Actions—Claim and Delivery—Principal and Surety—Parties.*—To an independent action by plaintiff in claim and delivery to recover upon the defendant's surety bond damages for the deterioration, etc., of the property wrongfully detained, the surety may be sued alone without joining the principal defendant in the former action. C. S., 458. *Moore v. Edwards*, 446.

5. *Actions — Causes of Action — Parties — Pleadings — Misjoinder — Dismissal.*—A misjoinder of parties and causes of action is demurrable and the action may be dismissed on defendant's motion, but as to misjoinder of causes of action the same will be divided. *Harrison v. Transit Co.*, 545.

6. *Same—Principal and Surety—Statutes—Contracts—Torts.*—Under our statute (chapter 50, sec. 3, 6(g), Public Laws of 1925), the owners of passenger autobusses for hire upon the highways of this State are

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required to take out liability insurance for the protection of its passengers and others, with the right of action given to the party injured by the negligence of the driver of the autobus, and thereunder a demurrer to the complaint against the autobus company and the surety on his bond, upon the ground that the action against the surety arises in contract, and that of the insured in tort, is bad. Cases where, under the contract, the principal alone is protected against loss, distinguished. *Ibid.*

7. *Actions—Torts—Deceit—Pleadings.*—In order to recover damages for tort or deceit in the sale of lands, it is required that the plaintiff specifically and definitely allege that the false representations of the defendant, the subject-matter of the action, causing the injury complained of, were made by the defendant with knowledge of their falsity, or with reckless disregard of their truth or falsity, and with the intent to deceive the plaintiff. *Stone v. Milling Co.*, 585.

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1. *Appeal and Error—Prejudice — Evidence — Questions and Answers — Rape—Identity of Prisoner—Alibi.*—Upon the question of the identity

APPEAL AND ERROR—*Continued.*

of the prisoner on trial for rape, a question and answer thereto is not prejudicial error, or should be stricken from the record on defendant's motion, when by the use of the word "there" the place of the crime was made clear by the other evidence addressed upon the same cross-examination, so that the jury could not have misunderstood it. *S. v. Mansell*, 20.

2. *Appeal and Error—Docketing Appeals—Hearings—Rules of Court.*—When the case on appeal has been agreed upon by the parties and so appears by entries of record, and at the request of either party the clerk of the Superior Court has sent it up to the clerk of the Supreme Court and there docketed promptly, as it is the clerk's duty to do, and in time for argument of the call of the district under the rule of Court, though otherwise the case would not then have stood for argument, it being thus docketed takes it from the control of the parties litigant, and the hearing will accordingly be regularly heard as placed. *Carswell v. Talley*, 37.

3. *Appeal and Error—Supreme Court—Pleadings.*—An answer filed in the Superior after the case is constituted in the Supreme Court on appeal can have no effect on the jurisdiction of the Supreme Court. *Rogers v. Rogers*, 51.

4. *Appeal and Error—Transcript—Docket—Record Proper—Certiorari—Motions.*—Where the record of a case on appeal is not docketed in the Supreme Court at the time required by the rule of Court, preceding the call of the district in which it belonged for argument, it will be dismissed, but the Court may, in its discretion and not as a matter of right of the appellant, grant further time for the filing of the record, if the appellant files the record proper in apt time and thereupon moves for a *certiorari*, showing that the delay was not attributable to himself. *S. v. Surety Co.*, 52.

5. *Same—Agreement of Counsel.*—The appellant is not justified in not docketing his case on appeal in time, by an agreement with the appellee to extend time for the settlement of a case on appeal. *Ibid.*

6. *Appeal and Error—Rules of Court—Dismissal.*—The rule of Court requiring the docketing of the appeal within a certain time, etc., is mandatory. *Ibid.*

7. *Appeal and Error—Instructions—Contentions—Objections and Exceptions.*—Exceptions to the statement of the contention of the parties by the judge in his instructions to the jury, cannot be sustained when not promptly taken, or after the verdict. *S. v. Messer*, 80.

8. *Same—Harmless Error.*—Upon the trial of a homicide, when a verdict of manslaughter has been rendered, a charge upon the law of murder in the second degree becomes immaterial. *Ibid.*

9. *Appeal and Error—Instructions—Criminal Law.*—Instructions on a trial for homicide will not be held for error if taken in its related parts it correctly informs the jury of the law applicable to the evidence. *Ibid.*

10. *Appeal and Error—Instructions—Evidence—Objections and Exceptions.*—The failure of the trial judge to recapitulate the evidence will not be held for reversible error in the absence of a request from the appellant that he do so. *Ibid.*

APPEAL AND ERROR—*Continued.*

11. *Appeal and Error—New Trials—Newly Discovered Evidence—Motions —Notice.*—The movant in the Supreme Court for a new trial for newly discovered evidence, is required among other things, to give his opponent at least ten days previous written notice to enable him to reply, and thus give the court information of the facts, unless upon application the court in its discretion fixes a shorter time. *Carr v. Bizzell*, 213.

12. *Appeal and Error—Briefs—Assignments of Error—Objections and Exceptions.*—Assignments of error in appellant's brief must conform to the rule of court requiring that they be based on exceptions duly noted. *Mesker v. West*, 230.

13. *Appeal and Error—Reference—Objections and Exceptions—Rules of Court.* — On appeal to the Supreme Court from the action of the Superior Court judge in passing upon the report of a referee, the facts found and the conclusions of law by the lower court must be regularly stated with the exceptions thereto in the record of the case on appeal. Rule 19(3), 21, 185 N. C., pp. 794, 795. *Wilson v. Beasley*, 231.

14. *Appeal and Error—Instructions—Presumptions.*—Where the charge of the court is not set forth in the record on appeal, it will be presumed to have been correctly given. *Lewis v. Lewis*, 267.

15. *Appeal and Error—Evidence—Objections and Exceptions—Broadside Exceptions.*—Where depositions are read in evidence in defendant's behalf, and the court stated that he will exclude that which relates to a phase of the controversy contradictory of the allegations of contributory negligence, the plaintiff's exception does not meet the requirement that objectionable evidence should be specifically objected to by the appellant, and his exception is too broadly stated to be considered on appeal. *Lane v. R. R.*, 287.

16. *Appeal and Error—Objections and Exceptions—Broadside Exceptions.*— An exception that does not particularize as to the error complained of in the admission of evidence, is objectionable as a broadside exception. *S. v. Jeffreys*, 318.

17. *Appeal and Error—Waiver — Certiorari—Habeas Corpus.*—Where the court below of record has erroneously denied the right of appeal to the convicted defendant in a criminal action, he waives this right by failing to apply for a writ of *certiorari*, and by instituting proceedings in *habeas corpus*. *S. v. Edwards*, 321.

18. *Appeal and Error—Case—Settlement by Trial Judge.*—When the judge who has presided at the trial is duly called upon to settle a case on appeal, it is not required that he conform in whole or in part to either of the statements submitted to him by the parties to the action, or settle differences between them in relation thereto, and he may disregard both statements. *Corporation Commission v. Bank*, 366.

19. *Appeal and Error — Feigned Issues — Moot Questions — Dismissal.* — Where the parties to the action agree upon points involving a feigned issue, as to the law, or one which does not actually involve a litigated right, the case will be dismissed on appeal to the Supreme Court. *Trade Association v. Doughton*, 384.

20. *Appeal and Error—Instructions—Record—Statement of Facts by the Judge.*—An instruction of the court based upon the judge's statement

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of fact not supported by the evidence appearing of record, and not conceded by the party adversely concerned, will not effect an error of law committed in the instructions to the jury, according to the record evidence in the case sent up. *Shipp v. Stage Lines*, 475.

21. *Appeal and Error—Instructions—Rewards.*—Where the trial judge in his charge considered contextually as a related whole and not disjointedly, correctly and unmistakably instructs the jury as to the plaintiff's right to recover a reward offered for the arrest and conviction of a murderer, it will not be considered as reversible error, that taking the charge disjointedly error may be made to appear. *Russell v. Wilmington*, 480.

22. *Appeal and Error—Burden of Proof—Harmless Error.*—The defendant cannot successfully complain that in the trial court he was not required to take the burden of the issue in question. *Crowder v. Construction Co.*, 502.

23. *Appeal and Error—Judgments—Default—Findings—Review.*—Where the Superior Court judge has made no findings of fact upon which he has refused to set aside a judgment by default for "mistake, inadvertence, surprise or excusable neglect," and the defendant has not requested him to do so, there is nothing before the Supreme Court on appeal upon which it may predicate a decision, and the judgment below will be affirmed. *Holcomb v. Holcomb*, 504.

24. *Appeal and Error—Trial—Actions.*—A party may not elect or try his case in the Superior Court upon one theory, and on appeal have the Supreme Court consider it upon a different theory. *Lamb v. Boyles*, 542.

25. *Appeal and Error—Review—Trial—Record—Pleadings—Evidence.*—On appeal, the Supreme Court will review the case upon the theory that it was tried in the Superior Court as disclosed by the complaint and evidence of record. *Mfg. Co. v. Hodgins*, 577.

26. *Appeal and Error—Issues—Evidence—Broadside Exceptions.*—Where the recovery under a policy of accident insurance depends upon the verdict upon several issues arising under certain stipulations of the policy, exception to evidence as applying solely to one of them and relating to all, will not be sustained on appeal. *Moore v. Ins. Co.*, 580.

27. *Appeal and Error—Trials—Election of Remedy—Review.*—Where the plaintiff has elected to try his action in the Superior Court exclusively on one theory, the Supreme Court on appeal will not review the case on a different one. *Stone v. Milling Co.*, 585.

28. *Appeal and Error—Judgments Set Aside—Questions of Law—Burden of Proof.*—Where the judge has set aside a verdict of the jury upon the ground that he has erroneously stated the law upon a controlling phase of the case, his action in so doing will be sustained in the Supreme Court, unless the appellant makes it appear of record that it was erroneous. *Von Herff v. Richardson*, 596.

29. *Appeal and Error—Objections and Exceptions.*—Exception to the admissibility of evidence must be taken at the time of its admission by the complaining party, for the exception to be considered by the Supreme Court on appeal. *DeLaney v. Henderson-Gilmer Co.*, 648.

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30. *Appeal and Error—Reference—Findings of Fact—Evidence—Review.*—The findings of fact by a referee upon competent evidence affirmed in the Superior Court on appeal thereto, is not reviewable on the further appeal to the Supreme Court. *Cotton Mills v. Cotton Yarn Co.*, 713.

31. *Appeal and Error—Certiorari—Docketing—Record Proper.*—The docketing of the record proper in the Supreme Court is a prerequisite to the consideration of a motion therein made for a *certiorari* to bring the appealed case up for review. *Baker v. Hare*, 788.

32. *Same—Extension of Time to Serve Case—Laches.*—Where the parties have agreed upon such extension of time for the service of their respective cases on appeal that the delay will cause the docketing of the case too late to come within the rule, the appellant having used his full time may not successfully move in the Supreme Court for a *certiorari* upon the ground that the delay was caused by a loss of the papers in it, for which he was not responsible, without proof sufficient to overcome evidence in denial of the allegation. *Ibid.*

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APPEARANCE BOND. See Escape, 1.

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ARREST. See Criminal Law, 5; Assault, 1; Homicide, 8.

1. *Arrest—Negligence—"Recklessness" — "Wantonness."* — The verdict of the jury in a negligence case that the recklessness of the driver of an automobile caused the injury of the plaintiff in a collision of the two cars, is alone insufficient for the court to grant plaintiff's motion for the issuance of an execution against the person of the defendant, there being no finding as to whether the act had been wantonly done. *Short v. Kaltman*, 154.

2. *Same—Evidence—Appeal and Error.*—The verdict of the jury upon the issues submitted may be construed in the light of the pleadings and evidence, etc., but the pleadings as to "recklessness" and "wantonness" will not control the answer to the issue of "recklessness" as applied to negligence when on appeal it does not appear what was the evidence thereof introduced upon the trial. *Ibid.*

3. *Arrest — False Arrest — Intoxicating Liquors — Spirituous Liquors — "Transportation"—Statutes.*—An arrest may not be lawfully made by the properly authorized officers of the law for the violation of our prohibition law, for the transportation of intoxicating liquors upon mere unfounded suspicion arising from information received that the supposed offenders would thus transgress the law on a future occasion, and an arrest so made, not upon an offense committed in the officers' presence or to their personal knowledge as to the particular offense, and without a search warrant, is unlawful and entitles the plaintiff in his action therefor, to recover damages. 3 C. S., 2411(f). *S. v. DeHerrodora*, 749.

4. *Same—Resisting Arrest—Evidence—Questions for Jury.*—Where there is evidence that the officers of the law while arresting one on trial

ARREST—*Continued.*

for a criminal offense found it necessary to fire upon the car in which the accused was fleeing, and that the latter, under the impression that the purpose of his pursuers was that of robbery, used only the force necessary to his resisting them under this impression, questions are raised for the jury to determine whether under the evidence the officers acted only with the force necessary for their purpose, and also as to the truth of the defense interposed. *Ibid.*

5. *Arrest—Officers—Unnecessary Force.*—Where the officers of the law wilfully and intentionally use more force than is necessary for their purpose, they are acting beyond the authority conferred upon them by law as such officers, and are liable as individuals for damages for the consequences of their unlawful act. *Ibid.*

6. *Arrest—Damages—Principal and Surety—Appeal and Error.*—Where an unlawful and unwarranted arrest has been made by the officers of the law and damages are recoverable against them, the sureties on their bonds are not liable in excess of the penalty on the bonds of each of the defendants separately given, and a judgment otherwise is erroneous. *Ibid.*

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1. *Assault—Arrest—Officers.*—The unnecessary use of a pistol by an officer in making an arrest under unjustifiable circumstances, is an assault. *S. v. DeHerrodora*, 750.

ASSESSMENTS. See Taxation, 3; Municipal Corporations, 3, 5, 6, 15; Banks and Banking, 17; Drainage Districts, 1.

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ASSIGNMENT. See Insurance, 2, 3; Bills and Notes, 10; Banks and Banking, 24.

ASSIGNMENT OF ERROR. See Appeal and Error, 12.

ASSUMPTION OF RISKS. See Master and Servant, 6.

ATTACHMENT.

1. *Attachment—Courts—Priority—Jurisdiction—Priority of Levy—Injunction.*—One claiming paramount right to property taken in attachment should assert it in court first acquiring jurisdiction, and where several attachments have been levied on the same property, under writs issued by a number of Superior courts, it is within the power of the court, first acquiring jurisdiction by seizure, to require the questions of priority to be determined in that court. *Hambley v. White*, 31.

2. *Same—Simultaneous Levies.*—Where two or more attachments against a fund in the hands of a garnishee are delivered to the sheriff at the same time, and served simultaneously, and the fund is insufficient to pay all of the attaching creditors according to their priority of levy, the funds remaining after the satisfaction of all the prior attachments, if any, will be applied pro rata among those whose attachments have been thus simultaneously executed. *Ibid.*

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3. *Same—Sheriffs.*—The sheriff upon the service of various attachments against the same property takes possession thereof and acquires a special interest therein enforceable by him for the protection of the attaching creditors in accordance with the priorities of their levies. *Ibid.*

4. *Attachment—Courts—Jurisdiction — Affidavit.* — Where in proceedings for attachment, it sufficiently appears of record that the court had jurisdiction of the subject-matter, it is unnecessary that the affidavit of the attaching creditors specifically allege its jurisdiction. C. S., 484, 799. *Bank v. Tolbert*, 126.

5. *Attachment—Courts—Jurisdiction—Levy—Actions.* — Where there are several actions in attachment brought in our courts of general jurisdiction to subject thereto the same moneys of the same defendant, the court first acquiring jurisdiction by levy determines the priorities of the claimants, while the actions in the other jurisdictions continue for the purpose of establishing the claims of each of the plaintiffs against the defendant therein, also involving and determining the question of title; *S. c., ante*, 31. *Hambley v. White*, 624.

ATTORNEY AND CLIENT. See Judgments, 4, 17; Evidence, 18.

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AUTOMOBILES. See Taxation, 5; Negligence, 3, 10, 14; Statutes, 9; Master and Servant, 6, 26; Evidence, 8; Insurance, 18, 20; Carriers, 6, 7; Damages, 2; Railroads, 4; Vendor and Purchaser, 1.

1. *Automobiles—Negligence—Passing Upon Highways — Signals — Warnings.*—The driver of an auto-truck along a public highway is not held to the same degree of care in observing those who may wish to pass him coming from the rear as in front, and is not required to turn to the right for such purpose, unless he is apprised by the one who wishes to pass, by proper signal, of his intention to do so. C. S., 2617. *Dreher v. Divine*, 325.

2. *Same—Reasonably Safe Conditions.*—The driver of an automobile upon the signal of a faster car approaching from the rear, must turn to the right so that the other may pass to his left, when the conditions existing there at the time are reasonably safe to permit the other to pass. *Ibid.*

3. *Same.*—The driver of an automobile who wishes to pass from the rear another ahead of him, must keep his automobile under control, so as to avoid a collision if the driver ahead of him apparently does not hear his signals or is not aware of his intention to pass, or the condition of the road makes it unsafe not only to himself, but to those who are driving from the opposite direction. *Ibid.*

4. *Automobiles—Traffic Rules—Parking Laws.*—It is not a violation of a parking law for a driver of an automobile to stop his car, keeping the motor running, long enough for the anticipated passing of another car speeding behind him to pass him on the highway. *Grier v. Grier*, 760.

BAIL. See Arrest.

BANKS AND BANKING. See Statutes, 3; Pleadings, 6; Descent and Distribution, 2.

1. *Banks and Banking—Officers—Ultra Vires Acts.*—A bank existing under the State or Federal law is only authorized to conduct its business under the limitations therein imposed, and the acts of its officials beyond these limits are *ultra vires*. *Bank v. Finance Co.*, 69.

2. *Same—Liability.*—A bank is not liable for the *ultra vires* fraudulent acts of its officials in furnishing information to its customer as to the financial standing of those local to the place in which the bank conducted its business. *Ibid.*

3. *Same—Evidence.*—Evidence is insufficient to make a bank liable for the *ultra vires* acts of its officers who receive compensation for the information as to the financial responsibility of persons within the locality in which the bank conducts its business. *Ibid.*

4. *Same—Presumptions.*—Those dealing with a bank are conclusively presumed to know that the *ultra vires* acts of its officials will not be binding on it. *Ibid.*

5. *Same—Burden of Proof.*—A bank is not liable for the *ultra vires* acts of its officials beyond the benefit it has actually received thereby, the burden of proof being on the plaintiff. *Ibid.*

6. *Banks and Banking — Directors — Officers — Guarantor of Payment — Equity—Subrogation.*—The directors of a bank who have individually guaranteed the indebtedness of the bank held by another or foreign bank, to be entitled to legal subrogation to the excess collaterals held by the creditor bank as security, must show a payment of such indebtedness or a part thereof, and claim only to the extent such payment has been made. *Everett v. Staton*, 216.

7. *Same—Conventional Subrogation.*—And to be entitled to conventional subrogation, they must show an agreement, duly passed and binding upon the bank, fairly made, and not tainted by fraud, bad faith or undue advantage, that the excess securities held by the creditor bank should inure to their benefit as guarantors if they would be in excess of the indebtedness they had guaranteed. *Ibid.*

8. *Same—Corporations—Meetings—Corporate Action.*—In order for the directors of the bank to have by equitable conventional subrogation an interest in the surplus collateral of a creditor bank who held their individual guaranty for the payment by the debtor bank, they must show a corporate action by resolution duly passed giving them this right by which they have acquired a lien upon such surplus collateral to protect them in their guaranty. *Ibid.*

9. *Same—Evidence.*—The mere fact that the president or other officials of the debtor bank understood that the individual directors who should give their personal written guaranty to the creditor bank would be protected by the collaterals of the debtor bank pledged to the payment of the debt so guaranteed, and that the individual directors so understood it, does not alone amount to such corporate assignment of the collaterals as would entitle the guarantors to conventional subrogation thereof. *Ibid.*

10. *Same—Record of Meeting.*—As to whether it is necessary for a record of a meeting of the board of directors of a bank to be kept wherein a

BANKS AND BANKING—*Continued.*

conventional assignment was given to its directors guaranteeing its obligations to another bank, in the collateral thereto hypothecated by the debtor bank (3 C. S., 221 (b). *Quœre? Ibid.*

11. *Banks and Banking—Corporations—Contracts—Shareholders—Officers—Consideration.*—While personal dealings between the shareholders and officers of the bank will be carefully scrutinized, they will be upheld when the transactions are made in good faith and the bank has been benefited thereby in the usual course of its authorized banking transactions. *Everett v. Staton*, 221.

12. *Same—Subrogation—Receivers—Debtor and Creditor.*—Where a stockholder and director of a bank have in good faith loaned their Liberty Bonds to it to enable it to get an extension of the time of payment of its note it had given to another bank, with collaterals hypothecated for its payment, and the creditor bank has sold these bonds with some other collaterals and discharged the extension note, and has turned the balance of the collaterals hypothecated to the receiver of the borrowing bank, which has since become insolvent: *Held*, to the extent of the unused collaterals, the officials who have so loaned their bonds are entitled to legal subrogation as against the claims of the other or general creditors of the bank represented by the receiver. *Ibid.*

13. *Same—Insolvency—Evidence.*—Under the facts of this case: *Held*, the mere fact that the borrowing bank afterwards went into the hands of a receiver did not affect the *bona fides* of the stockholder and director who had loaned it their individual bonds in order to enable it to obtain an extension of the time of payment of a note for money borrowed by it from another bank. *Ibid.*

14. *Same—Legal Subrogation—Definition.*—Legal subrogation is defined to be "an equity called into existence for the purpose of enabling a party, secondarily liable, but who has paid the debt, to reap the benefit of any securities or remedies, which the creditors may hold as against the principal debtor, and by which the party paying may be made whole." *Ibid.*

15. *Same—Debtor and Creditor—Unsecured Claims—Distribution of Assets.*—While a stockholder or director of a bank may be entitled to subrogation to the rights of their bank to whom they have loaned their personal collateral to enable it to obtain an extension of time of payment on a note it had given to another bank, to the extent of the borrowing bank's unexhausted collateral it pledged to the note, as to the other or general collateral of the borrowing bank, since becoming insolvent and in a receiver's hands, their relation is that of general creditors, and they are only entitled to the proceeds in its distribution among the general or unsecured creditors of the insolvent bank. *Ibid.*

16. *Banks and Banking—Corporations—Officers—Directors—Trusts—Negligence—Damages.*—Directors and general managers of a bank are held to the responsibility of trustees in regard to their official duties, and are liable to its receiver for loss of the corporation assets caused and brought about by their neglect or failure to perform their duties in this respect. *S. v. Trust Co.*, 246.

BANKS AND BANKING—*Continued.*

17. *Banks and Banking—Receivers—Shareholders—Assessments—Statutes.* The liability of a stockholder of a bank to the corporation in addition to the par value he has paid, is contractual, C. S., 237, and the amount of his liability when the bank has become insolvent and in the hands of a receiver, is determinable in the original action brought for the liquidation of the bank and the issuance of summons duly served under order of court. C. S., 239. *Corporation Commission v. Bank*, 366.

18. *Same—Payment—Discharge of Liability—Costs.*—Where the assets of an insolvent bank in a receiver's hands are insufficient, and assessment among the individual stockholders becomes necessary, each shareholder is entitled to have the amount he is chargeable with lawfully determined, and when this has been done, he may pay it and be discharged from further liability without incurring costs in the proceedings. The question as to whether the costs may be in proper instances apportioned by the court, as in suits in equity, does not arise in this case. *Ibid.*

19. *Same—Actions.*—Where the assessments have been duly made under our statutes against the individual stockholders of an insolvent bank in the proceedings for liquidation, the receiver under the order of court may institute an independent action against the shareholders in default for its payment, and if successful the costs of this action are taxable against such stockholders, but not those incurred in the original proceeding under the provisions of C. S., 240. *Ibid.*

20. *Same—Opportunity to be Heard.*—Where the individual stockholders have been made parties to liquidate the bank by which the shares had been issued, they must be afforded an opportunity to be heard before assessments are made in order that they be thereafter precluded from contesting the amount. *Ibid.*

21. *Same—Issues—Trial by Jury—Reference—Statutes.*—Before the stockholders of an insolvent bank can be individually assessed for the payment of its debts, etc., the amount of the assets and liabilities must first be determined, and when an issue is raised by denial of the receiver's allegation or statement thereof in the original suit for dissolution, an issue of fact is raised for the determination of the jury, or by reference under the provisions of C. S., 573(1), (2). *Ibid.*

22. *Banks and Banking—Insolvency—Officers—Deposit Received by Officers With Knowledge of Insolvency—Actions—Receivers—Parties—Statutes.*—Where the managing officials of a bank know of its insolvency, and permit a deposit to be made by its customer, the assets are increased and not diminished, and an action will lie in behalf of the depositor against such officers committing the wrong without demand upon the receiver later appointed, or the necessity to have him bring the action, in behalf of the wronged depositor, whose money has thus become an asset, in the receiver's hands, and not a liability of the defunct bank. *Douglass v. Dawson*, 190 N. C., 458, cited and distinguished. 3 C. S., 224(g). *Bane v. Powell*, 387.

23. *Same—Pleadings—Demurrer—Appeal and Error—Reversible Error.*—It is unnecessary for the complaint to have alleged a demand upon the receiver of a defunct bank, and his refusal to bring action in

BANKS AND BANKING—*Continued.*

behalf of plaintiff, under the facts of this case, and for the trial judge to sustain a motion of nonsuit upon that ground alone, was reversible error. *Ibid.*

24. *Banks and Banking—Depositors—Debtor and Creditor—Assignment of Assets.*—The relation between a bank and its depositor is that of creditor and debtor, and the former may make an assignment of its notes and other assets to secure the deposit in good faith, and in the due course of its business. *Trust Co. v. Rose*, 673.

25. *Same—Principal and Surety—Officers—County Deposits—Statutes.*—Where the officers of the bank acting without personal advantage or gain sign as sureties on an obligation of the bank executed to the commissioners of a county in the manner and form required by C. S., 1389. *Ibid.*

26. *Same—Directors—Resolutions.*—Where the officers of a bank acting in good faith and without personal profit or advantage execute a bond of indemnity for the deposit of county funds, C. S., 1389, it is not required for the validity of the bond that the directors authorize the same by a resolution duly passed in order to protect the rights of the sureties, officers of the bank. *Ibid.*

27. *Same—Receivers—Creditors—Distribution of Funds.*—The sureties on an indemnity bond given by a bank to secure a deposit of county funds required by C. S., 1389, are entitled to the collateral given them by the bank for their protection in becoming such surety, and is available to them in preference to that of a receiver of the bank, thereafter appointed by the court, claiming the proceeds for distribution among the general creditors of the bank, when the transaction has been made by the sureties in good faith and without personal advantage to them. *Ibid.*

28. *Same—Consideration.*—The consideration moving to a bank when its officers without individual benefit become sureties on its indemnity bond given for a county deposit, under the requirements of the statute, is the deposit so obtained. *Ibid.*

29. *Banks and Banking—Corporations—Reorganization—Notice—Meetings—Implied Notice—Evidence.*—Where the complaining stockholders rely upon a failure to give special notice at a regular meeting of the reorganization of a bank under a different name, etc., and deny individual liability upon the ground that the reorganization was invalid, evidence that they signed proxies to be used at this meeting, were given notice to exchange their old shares for the new, and that they permitted the new organization to continue business for two years without objection, etc., is sufficient notice to give validity to the reorganization and to make them individually liable for an assessment made by the receivers in an action lawfully brought under the direction of the court. *Rogers v. Cozart*, 720.

30. *Same—Collateral Attack.*—The validity of a reorganization of a banking institution cannot be collaterally attacked by stockholders seeking to avoid individual liability upon the ground of want of notice of the meeting of the stockholders at which the appropriate resolution therefor had been passed, under the facts of this case.

BANKS AND BANKING—*Continued.*

31. *Same—Consent to Liquidation and Reorganization. Held*, under the facts of this case the questions of whether the defendants had actually exchanged their old shares of stock for those in the reorganized bank, or their consent to the liquidation of the old bank and the reorganization of the new one, are not decisive of the defendant's individual liability to assessment under the provisions of our statute. *Ibid.*

BENEFICIARIES. See Wills, 12, 20.

BENEVOLENT SOCIETIES. See Religious Societies.

1. *Benevolent Societies—Fraternal Orders—Supreme Lodge—Constitution and By-Laws—Evidence—Injunction.*—Where a local or benevolent fraternal order exists under a charter granted by the supreme council, and for years the local order has become inactive on account of failing interest and membership, with its meetings discontinued, and the question of an injunction against the sale of its property by a few of its members claiming to be in financial standing is restricted by the plaintiffs, also claiming to be in good financial standing, the sole question being as to whether a written notice was required under the constitution and by-laws of the supreme lodge: *Held*, an authenticated copy of the constitution and by-laws of the supreme lodge, under the existing circumstances may be introduced in evidence, showing that a previous written notice was required, and make a prima facie case thereof. *Tyler v. Howell*, 433.

2. *Same—Injunction.*—Where a local fraternal and benevolent lodge has existed under the constitution and by-laws of the supreme lodge requiring written notice to be given to its members before suspension as a financial member, etc., for nonpayment of dues, etc., and such notice has not been given accordingly: *Held*, a resolution passed at a meeting of the local lodge authorizing a sale and conveyance of its property by trustees, C. S., 6536, without complying with this requirement, is invalid, and at the suit of such wrongfully suspended members an injunction will lie. *Ibid.*

BIGAMY. See Criminal Law, 2.

BILLS AND NOTES. See Equity, 7; Negotiable Instruments.

1. *Bills and Notes—Negotiable Instruments—Infirmities—Endorsement—Holder in Due Course—Burden of Proof.*—Where in an action upon promissory notes appearing in form to be negotiable, it is admitted by the defendants that the notes were signed and delivered to the payee, sets up certain equities against him, and denies that the plaintiff by endorsement is the holder in due course, and the alleged infirmities of the instrument are admitted by the plaintiff, the burden is upon the plaintiff to show that he is a holder in due course, that the endorsement to him by the payee was genuine, and before maturity, in order to avoid liability as to the existing equities between the original parties. C. S., 3033, 3036, 3039, 3040. *Whitman v. York*, 87.

2. *Same—Admissions.*—Where there is an undated endorsement of an instrument negotiable in form of the name of the payee, and the maker in his answer in the action on the note denies that the plaintiff, the endorsee, was a holder in due course, and sets up certain equities, the

BILLS AND NOTES—*Continued.*

defendant's admission that the plaintiff was the equitable holder of the instrument, cannot be held as an admission that the plaintiff was a holder in due course, or relieve the plaintiff of the burden of showing the genuineness of the endorsement, or that it was transferred before maturity. *Ibid.*

3. *Same—Admissions—Evidence.*—While the burden is upon the defendant, the maker of a negotiable note, to show infirmities in a negotiable instrument in an action by the plaintiff claiming as a holder in due course, the plaintiff's admission of these infirmities renders it unnecessary for defendant to offer evidence thereof. C. S., 2976. *Ibid.*

4. *Same—Instructions.*—Where the plaintiff in an action to recover of the maker of a note, negotiable in form, claims to be a holder in due course by the endorsement of the payee, which is denied and evidence to the contrary is introduced by the defendant, but no evidence is introduced by the plaintiff except an undated endorsement in the plaintiff's name and the date of the maturity of the note has passed, an instruction is proper that the jury, upon the evidence, if believed, answer the issue as to the infirmity of the instrument, for defendant. C. S., 3010. *Ibid.*

5. *Bills and Notes — Negotiable Instruments — Holder — Endorser—Equities.*—A holder of a negotiable instrument without endorsement takes subject to existing equities between prior parties thereon. *Ibid.*

6. *Same—Actions—Judgments—Appeal and Error.*—Where by endorsement a holder takes subject to existing equities between prior parties, but not as a holder in due course, he has his right of action against his endorser, and a judgment requiring him to cancel and file the instrument sued on, with the clerk, is erroneous. *Ibid.*

7. *Bills and Notes—Negotiable Instruments—Fraud—Burden of Proof.*—Where the holder of a note alleges he is the holder in due course, and there is allegation in reply with evidence that he acquired with knowledge of payee's fraud, the burden is on the holder in his action on the note to show he was an innocent purchaser for value. C. S., 3033, 3036, 3038, 3040, *Hooker v. Hardee*, 229.

8. *Bills and Notes—Principal and Surety—Parol Evidence—Equities—Innocent Purchaser for Value.*—As between the original payee and those whose names appear to have been signed as makers of a negotiable instrument, it may be shown by parol evidence that one or more of those who signed as makers signed in fact as surety for the other or others, but not as against an endorser, who acquired the instrument for value and holds innocently without notice of such relationship. *Trust Co. v. Boykin*, 262.

9. *Same—Mortgages—Liens—Equity—Subrogation—Parol Evidence.*—One whose name appears as one of the makers upon a negotiable note secured by a first mortgage lien, may show by parol evidence as against a subsequently registered mortgage, that he had signed as surety, and was entitled to subrogation to the rights of the mortgagee holding the first lien on the land subject to the two encumbrances. *Ibid.*

BILLS AND NOTES—*Continued.*

10. *Same—Payment—Assignment to the Use of Surety—Cancellation.*—In order for one signing a negotiable instrument secured by a first lien or mortgage to pay off the indebtedness and retain his lien as against those holding a lien under a subsequent mortgage, he must have the instrument endorsed to another for his use, and by canceling the mortgage security of record he loses his right, and only the relationship of an unsecured creditor exists. *Ibid.*

11. *Same—Judgments.*—Where the payee of a note secured by a first mortgage note on the maker's land has reduced it to judgment in his suit to foreclose, and there appears thereon apparently as a comaker one who claims to have signed only as surety and who has paid off the mortgage indebtedness, the mortgage indebtedness merges into the judgment, and for the alleged surety who has discharged the indebtedness to be entitled to the equity of subrogation to the mortgagee's right, he must further show that the judgment had been transferred to another to his own use, and a payment thereof by him destroys this right. *Ibid.*

12. *Bills and Notes—Negotiable Instruments—Actions and Defenses—Consideration—Fertilizers—Statutes.*—A total absence of consideration received by the maker of a negotiable note is a matter of defense by the maker in an action brought thereon by the original payee of the note, and not against a holder thereof in due course purchasing without knowledge of the defect in the instrument. C. S., 3008, 3033. *Swift & Co. v. Aydlett*, 330.

13. *Same—Vendor and Purchaser—Implied Warranty.*—In proper instances the user of fertilizers may show in defense of an action by the original payee of a promissory note given to the vendor manufacturer in payment thereof, that the fertilizers delivered to and used by him were useless and not beneficial for the purpose for which they were bought, and which were in contemplation of both of the parties at the time of the transaction, in the absence of opportunity for inspection; or when not observable until some time after the planting of the crop. *Ibid.*

14. *Same—Express Provisions as to No Warranty of Use.*—A user of fertilizers may avail himself of a defense upon an implied warranty in an action brought by a manufacturer thereof on a note given by him for the purchase price, that the fertilizers furnished were worthless as such and for the purposes intended, though there is an express provision in the note sued on that it was without "warranty as to results from use or otherwise." *Ibid.*

15. *Same—Caveat Emptor.*—The doctrine of *caveat emptor* does not apply to the purchaser and user of fertilizers in defense to an action by the latter to recover the purchase price, as against an implied warranty that the goods so bought were at least merchantable and were not absolutely worthless. *Ibid.*

16. *Same—Tags—Ingredients—Statutes.*—Manufacturers and vendors of commercial fertilizers impliedly warrant that they contain the ingredients specified on the tags placed on the bags, according to the requirements of the statute. C. S., 4690. *Ibid.*

BILLS AND NOTES—*Continued.*

17. *Same—Burden of Proof — Consideration — Contracts.*—The burden of proof is upon the manufacturer to show, in his action against the purchaser for the purchase price, that the goods were at least merchantable, and that the ingredients used in their manufacture were in accordance with the specifications upon the tags placed on the bags under the requirement of our statute, C. S., 4690, and the purchaser may defend the action by his evidence to the contrary, as a failure of consideration. *Ibid.*

18. *Bills and Notes—Negotiable Instruments—Endorsers—Notice of Dishonor—Evidence.*—Where a negotiable note sued on has the name of the defendant endorsed thereon without indication that he has signed in any other capacity, and he is not notified of its nonpayment at maturity, as the statute requires, C. S., 3086, evidence that he had signed otherwise is incompetent, and he is discharged from liability thereon, C. S., 3044, 3071. *Busbee v. Creech*, 499.

19. *Bills and Notes—Negotiable Instruments—Endorsers—Mortgages—Partial Payment — Limitation of Actions — Statutes.*—Where a chattel mortgage on crops secures the payment of the maker's note and the mortgagee endorses the note, C. S., 441, 3044, and mortgages to another, the bar of the three-years' statute of limitations which has otherwise run will not be repelled by payments on the note from the sale of the crop, as against the endorser, or without evidence of his intent to make the payment and thus impliedly at least acknowledge the debt; and his having attended the mortgage sale of the crop and become a purchaser, is not sufficient. *Nance v. Hulin*, 665.

20. *Bills and Notes—Negotiable Instruments—Holder by Endorsement—Discharge of Endorser's Liability.*—Where the holder of a negotiable instrument by endorsement has acknowledged in his action that he had acquired the instrument from his immediate endorser without a consideration, and that it was delivered to him after maturity with knowledge of the infirmity of the instrument, he may not successfully defend in the suit of the maker to have the note canceled, upon the ground that he is a holder by endorsement for value. *Lumber Co. v. Buchanan*, 771.

21. *Same—Endorsee's Releasing Maker From Liability.*—Where the holder of a negotiable instrument releases the maker from liability thereon, he thereby discharges from liability his endorser from whom he acquired the instrument, C. S., 3102. The question as to whether the former relinquished his right of recourse against his immediate endorser under the facts of this case is not presented or decided, but discussed by *Adams, J. Ibid.*

22. *Same—Liability of Subsequent Endorsers—Right Expressly Retained—Statutes.*—Where the holder by endorsement has discharged subsequent endorsers therein by releasing the maker from liability thereon, he may not hold his immediate endorser without having first obtained his consent or reserved the right of recourse against him. C. S., 3102. *Ibid.*

23. *Bills and Notes—Mortgages—Fraud in the Factum—Holder in Due Course—Fraud in the Treaty.*—Where a mortgage on lands and the note it secures are obtained through fraud in the *factum*, it is void and the endorsee of the note can acquire no rights thereunder though

BILLS AND NOTES—*Continued.*

a holder acquiring the instrument in due course, before maturity and without notice of the infirmity of the instrument, but otherwise if the fraud was in the treaty. *Parker v. Thomas*, 798.

BLASTING. See Negligence, 19.

BLOODHOUNDS. See Criminal Law, 7.

"BLUE SKY" LAW. See Corporations, 2.

BONDS. See Principal and Surety, 1; Schools, 9; Mechanics' Liens, 2, 5, 7; Highways, 7; Taxation, 9.

BOUNDARIES. See Evidence, 2.

1. *Boundaries—Burden of Proof.*—The burden of proof is on plaintiff in his action to locate the true dividing line between his own and the defendant's adjoining land. *Carr v. Bizzell*, 212.

BREACH. See Contracts, 6, 9, 25, 26, 27; Fertilizers, 2.

BRIDGES. See Highways, 4.

BRIEFS. See Appeal and Error, 12.

BROADSIDE EXCEPTIONS. See Appeal and Error, 16, 26.

BURDEN OF PROOF. See Carriers, 1; Homicide, 2; Actions, 1; Banks and Banking, 5; Bills and Notes, 1, 7, 17; Deeds and Conveyances, 4; Boundaries, 1; Equity, 1; Contracts, 21; Election of Remedies, 2; Appeal and Error, 22, 28; Conflict of Laws, 1; Trusts, 2; Instructions, 13.

BURNING. See Criminal Law, 7.

BY-LAWS. See Benevolent Societies, 1.

CANCELLATION. See Contracts, 11, 13; Bills and Notes, 10; Insurance, 11, 12, 13; Equity, 7.

CANONS OF DESCENT. See Estates, 10.

CARRIERS. See Negligence, 4.

1. *Carriers—Negligence—Evidence—Burden of Proof—Transportation—Damages—Prima Facie Case.*—In order to recover of a common carrier damages to a shipment of goods, the plaintiff must show the carriers' assumption of the obligation to transport and deliver, expressed or implied, and a failure in this duty by the carrier, i. e., nondelivery or delivery under its contract in a damaged condition, and thereupon the plaintiff has made out a prima facie case. *Brown v. Express Co.*, 25.

2. *Same—"Good Condition"—Presumptive Evidence.*—The formal receipt of the consignment of goods by the common carrier is presumptive evidence of its good condition, in the absence of notation or entry thereon to the contrary. *Ibid.*

3. *Carriers—Railroads—Negligence—Evidence—Grade Crossings—Signals.*—The running of a railroad train at an excessive speed across a public road grade crossing of a town without timely warning by

CARRIERS—*Continued.*

blowing the whistle of the locomotive, is evidence of its actionable negligence in an action by a passenger in an automobile against the company, or by his administrator for his wrongful death. *Earwood v. R. R.*, 27.

4. *Carriers—Railroads—Easements—Drainage—Conditions—Negligence—Damages.*—Where a railroad company has acquired an easement in lands to cut certain ditches for draining, upon condition to keep them open or unobstructed, it is liable for damages to the land caused by its failure to comply with the conditions set forth in the easement. *Clark v. R. R.*, 280.

5. *Carriers—Railroads—Depots—Lights—Negligence—Evidence—Nonsuit.* A railroad company is required to exercise a high degree of care in providing for its passengers a reasonably safe place to pass from its trains to its passenger depot, and at night to properly light such places for the safety of its passengers, and where there is conflicting evidence as to its failure or omission of duty in this respect, it is sufficient to be submitted to the jury upon the issue of its actionable negligence, and to deny its motion as of nonsuit upon the evidence in the case. *Lane v. R. R.*, 288.

6. *Carriers—Automobiles—Bus Lines—Combinations—Contracts—Negligence—Damages.*—Where there is sufficient legal evidence that several autobus lines operated between certain cities and towns, for the transportation of passengers for hire interchangeably, or the drivers for one line would take the passengers who had bought tickets over another of them as if sold over its own line, a ticket sold over one of these lines being equally acceptable by the other, either of the combined lines is responsible in damages for a personal injury negligently inflicted on a passenger. *Myers v. Kirk*, 700.

7. *Carriers—Evidence—Automobiles—Receipts—Appeal and Error—Harmless Error.*—Where a passenger is negligently injured by the negligence of the defendant while riding on its car, and in his action to recover damages the question arises as to whether the defendant corporation was regularly engaged in transporting passengers for hire, the amount of money the defendant received for such services and the number of cars it thus had in use is competent evidence thereof, though not for the purpose of showing its commercial rating: *Held, further*, under the facts of this case the admission of such evidence would not constitute reversible error. *Ibid.*

CARTWAYS. See Highways, 9, 11.

CASE. See Deeds and Conveyances, 1; Appeal and Error, 18, 32.

CAUSE OF ACTION. See Pleadings, 1; Reference, 2; Actions, 5.

CAVEAT EMPTOR. See Mortgages, 2; Bills and Notes, 15.

CERTIFICATE. See Deeds and Conveyances, 18; Statutes, 11.

CERTIORARI. See Appeal and Error, 4, 17, 31; Habeas Corpus, 1, 2, 3, 5; Statutes, 8.

1. *Certiorari—Habeas Corpus—Fugitives From Justice—Requisitions—Judgments—Appeal and Error—Review.*—Where the Governor of this

CERTIORARI—*Continued.*

State has passed upon and allowed a requisition of the Governor of another State for a fugitive from justice who has there been convicted of crime, and in proceedings in *habeas corpus* there is no valid defense made to the judgment concerning which the requisition had been made and allowed, a *certiorari* will be denied in the Supreme Court to bring the proceedings had below up for review. *S. v. Adams*, 787.

CHANGE. See Schools, 2; State Highway Commission, 1.

CHARACTER. See Evidence, 6.

CHARGE. See Instructions, 13.

CHARTER. See Schools, 3.

CHATTEL MORTGAGES.

1. *Chattel Mortgages—Definition—Choses in Action.*—A chattel mortgage is a conditional transfer of the property pledged, vesting the title in the mortgagee absolutely in law upon condition broken, and as against purchasers and creditors must be registered. C. S., 3311. *Sneeden v. Nurnberger's Market*, 439.

CHECKS. See Pleadings, 12.

CHILD. See Tenants in Common, 11.

CHOSES IN ACTION. See Chattel Mortgages, 1.

CHURCHES. See Religious Societies, 1.

CIRCUMSTANCES. See Wills, 4.

CITIES AND TOWNS. See Municipal Corporations, 6, 8, 9, 10, 11, 15; Mechanics' Liens, 2, 4, 5, 6, 7; Schools, 6.

CITIZENS. See Municipal Corporations, 2.

CLAIMS. See Banks and Banking, 15.

CLAIM AND DELIVERY. See Actions, 4; Judgments, 9.

1. *Claims and Delivery — Statutes — Principal and Surety — Sheriffs—Wrongful Seizure of Property.*—Where the landlord in claim and delivery pursues the remedy therein provided by statute, C. S., 831(1), 832, 833, 834, of certain farm products raised on the lands, particularly describing them, and in addition the sheriff has seized and retained some of the defendant's household furniture located on the premises, in an action by the defendant in that action against the plaintiff therein and the surety on his bond: *Held*, the plaintiffs in the present action cannot recover damages against the defendants in the claim and delivery proceedings for the wrongful detention of the household furniture not therein specified or described. *Williams v. Perkins*, 175.

2. *Same—Damages—Actions.*—Where the sheriff has wrongfully seized certain personal property of the defendant in claim and delivery, not described therein as the subject of such seizure, the defendant may maintain an independent action for damages against the sheriff. *Ibid.*

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1. *Conflict of Laws — Lex Loci Forum — Evidence — Burden of Proof — Statutes.*—Where a party to an action contends that the law of the forum in another state controls the disposition of the issues involved, he is required to show statute or written law or controlling decisions thereon, or such facts as would make the laws of that state applicable. C. S., 1749. *Tire Co. v. Lester*, 642.

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56, 74, 79. Surplus of sale of realty to pay debts regarded as realty. Executors. Action of judgment creditors. Presumptions. *Wadford v. Davis*, 484.

74. Personalty of decedent sold by administrator before encroaching on lands descendible to heirs. *Mosely v. Mosely*, 243.

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224(g), 3 C. S. Shareholders may maintain action against officers whose conduct has caused diminishing of bank's assets. *Bane v. Powell*, 387.

237, 239. Individual liability of stockholder of bank becoming insolvent is contractual and determinable in original cause by receiver, etc. *Corporation Commission v. Bank*, 366.

237, 240, 423, 218(a), 219(a), 3 C. S. Amendment extends actions to within ten years by receiver of bank against stockholders. *Litchfield v. Roper*, 202.

240. What court costs are taxable against stockholders of insolvent bank. *Corporation Commission v. Bank*, 366.

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441, 3044. Endorser on chattel mortgage note is not held by payments thereon of maker. *Nance v. Hulin*, 665.

456. Judgment creditors interested in surplus of sale of realty to pay decedent's debts are necessary parties. *Wadford v. Davis*, 484.

458. Surety may be sued alone in action for damages in claim and delivery. *Moore v. Edwards*, 446.

484, 799. When unnecessary for affidavit in attachment to allege jurisdiction. *Bank v. Tolbert*, 126.

492. Judgment by service of summons by publication for material furnisher may be set aside by nonresident owner of the lands. *Lumber Co. v. Rhyne*, 735.

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519, 1743. Answer sufficient to raise issue in suit to remove cloud on title. *Brinson v. Morris*, 215.

521. Counterclaim against receiver of husband's interest in deposit of deceased wife in insolvent bank. *Williams v. Williams*, 405.

525. Replication by plaintiff unnecessary when answer apparently sets up a counterclaim which is only a defense. *Simon v. Masters*, 731.

564. Where court's instruction in criminal case directing verdict is correct. *S. v. Moore*, 209.

564. Where verdict cures error of instructions in criminal case. *S. v. Church*, 658.

564. Instructions failing to charge upon both principles of fraud in *factum* and treaty are erroneous. *Parker v. Thomas*, 798.

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564, 4639. Upon trial for murder judge must instruct on principles of manslaughter arising under evidence. *S. v. Hardee*, 533.

565, 4639, 4640. Assault upon person is included in indictment for highway robbery. Instructions. Deadly weapon. Conflicting evidence. Questions for jury. *S. v. Holt*, 490.

567. Nonsuit in conflicting evidence in action under Federal Employers' Liability Act. *Inge v. R. R.*, 522.

567. Judgment of nonsuit not granted for contributory negligence of injured employee of railroad company. *Ritchie v. R. R.*, 666.

573. Compulsory reference in action upon note involving accounting. Pleas in bar. Pleadings. *Bank v. McCormick*, 42.

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610. Judgment in claim and delivery when not an estoppel in independent action for damages. *Moore v. Edwards*, 446.

661, 1256. Appeal from justice's court unsuccessful party taxed costs in both courts. *Ritchie v. Ritchie*, 538.

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1005, 1007. Evidence of resulting trust in wife incompetent. Husband and wife. Fraud. *Tire Co. v. Lester*, 642.

1137. Evidence insufficient to sustain service of process on Insurance Commissioner. *Timber Co. v. Ins. Co.*, 115.

1389. Officers of bank in good faith and without profit may secure their suretyship on bond given state for deposit of road funds. Corporate resolution. Receivers. *Trust Co. v. Rose*, 673.

1393. Mandamus. See secs. 3634 *et seq.*, 3655. *Lewis, Treas., v. Comrs. of Wake*, 456.

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1716, 3846(bb), 3 C. S. State Highway Commission. Government. Action in tort. *McKinney v. Highway Commission*, 670.

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1737. Estate in remainder to named children of testator upon condition they die leaving issue. *Yarn Co. v. Dewstoe*, 121.

1739. This section does not control intent of testator. *Massengill v. Abell*, 240.

1745, 3215. Tenants for life remainder to children may not divide lands as tenants in common. *Burton v. Cahill*, 505.

1749. *Lex loci contractus* must be shown by party claiming thereunder. *Tire Co. v. Lester*, 642.

1763, 3305, 3 C. S. Clerk of court must pass upon probate of deed with order for registration. *Woodlief v. Woodlief*, 634.

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1795. Manual delivery of deed not a transaction, etc., excluded as evidence. *Barton v. Barton*, 453.

1795. Evidence of services rendered a deceased person competent. *Pulliam v. Hege*, 459.

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2411(f), 3 C. S. Unfounded suspicion insufficient for officer to arrest, without warrant. *S. v. DeHerrodora*, 749.

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2445. Subrogation of surety who has paid materialmen's liens to rights of principal contractor. Municipal corporations. Equity. Principal and Surety. *Mfg. Co. v. Blaylock*, 407.

2445. Note taken in course of business does not release surety on bond of contractor for municipal building. *Moore v. Material Co.*, 418.

2445. Remedy by indictment only for failure to require bond of surety to protect material furnishers for construction of public highways. *Hunter v. Allman*, 483.

2515, 3241. When title to lands held in common sold by order of court does not pass to purchaser estates by entireties. Husband and Wife—Resulting Trusts—Statutes as to wife's probate—Color of Title—Adverse Possession—Consent Judgment. *Crocker v. Vann*, 422.

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3008, 3033. Failure of consideration for negotiable instrument a defense between original parties. *Swift & Co. v. Aydlett*, 330.

3010. Instructions directing verdict. See section 3033. *Whitman v. York*, 87.

3033, 3036, 3039, 3040. Burden of showing plaintiff a holder in due course. Equity. *Whitman v. York*, 87.

3033, 3036, 3038, 3040. Burden on one claiming as a holder in due course upon allegation of fraud. *Hooker v. Hardy*, 229.

3044, 3071, 3086. Evidence otherwise as to endorser on negotiable note incompetent. Failure of notice of dishonor. Discharge from liability. *Busbee v. Creech*, 499.

3102. Discharge of maker of negotiable instrument discharges endorser. Subsequent endorser. Recourse. *Lumber Co. v. Buchanan*, 771.

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3311. Registration of chattel mortgage notice to creditors. *Sneeden v. Nurnberger's Market*, 439.

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3411(f), 3 C. S. Killing under officer's suspicion that the deceased was violating prohibition law, manslaughter. *S. v. Simmons*, 692.

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3795. Individual liability does not attach to county road commissioners. *Holmes v. Upton*, 179.

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4162. See 1734. *Walker v. Trollinger*, 744.

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5481, 3 C. S. Review of evidence on appeal from restraining order in relation to school districts. Change of district. Action of board final. Repealing Statutes. *Causey v. Guilford County*, 298.

5481, 3 C. S. Taxation of school districts under county-wide plan. Publication of notice. Technical error. Elections. *Flake v. Comrs. of Anson*, 590.

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6347. Substantial compliance is required. *Mortt v. Ins. Co.*, 8.

6363, 6367. Blue Sky Law applies to domestic corporations. Procurement sales of shares by unlicensed agent. Actions. Commissions. *Hotel Corp. v. Bell*, 620.

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1. *Constitutional Law—Contracts—Vendor and Purchaser—Fertilizers.*—The provisions of C. S., 4697 as to the requirements of the manufacturer of commercial fertilizer, are constitutional and valid. *Swift & Co. v. Aydlett*, 331.

2. *Constitutional Law—Municipal Corporations—Ordinances—Filling Stations—Guardian—License—Discrimination.*—The erection and maintenance of a gasoline filling station, in conformity with the statutory regulations and those conferred by statute, upon local municipal authorities, is not a nuisance, but involves the lawful property rights guaranteed by the Constitution of the United States (Fourteenth Amendment), and of the State. *Bizzell v. Goldsboro*, 348.

3. *Same—Discrimination—Police Powers.*—A city ordinance which professes to regulate the erection and maintenance of gasoline filling stations within the incorporated limits thereof, providing in effect that permits for such stations shall not be granted without the consent of the board of aldermen of the city, is in violation of property rights guaranteed by the Constitution in not prescribing a uniform rule by which such permits may be obtained. The distinction between the conduct of a business that is not harmful and unsafe and those that are, and fully within the lawful exercise of the police power of a municipality, pointed out and distinguished by *Clarkson, J. Ibid.*

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4. *Same—Discretionary Powers — Notice — Hearings — Courts—Abuse of Discretion—Appeal and Error.*—Where the conduct of a business is lawful, and falls within the police powers of regulation by a municipality or such as may affect the public morals, health, etc., of the municipality, notice must first be given to one applying for license, or who is affected by the revocation of his license, and a hearing afforded him, and decision made according to the sound discretion of the municipal authorities with right of appeal to the courts as to whether the discretion vested in them had been arbitrarily or unjustly exercised or not. *Ibid.*

5. *Constitutional Law—Homicide—Instructions—Presence of Prisoner—Appeal and Error.*—Where the judge has inadvertently charged upon the trial for a homicide that the State must prove its case by the greater weight of the evidence, and immediately after the jury has withdrawn for its deliberation, defendant's counsel has called this error to the court's attention, and informed the court that he had unmistakably corrected his error in other portions of the charge, and that it was useless to recall the jury, and thereupon the judge went to the jury room and corrected his error, standing in the open doorway of the jury room just beyond that of the unlocked courtroom door, where the defendants and their attorneys were sitting, having declined to accompany the judge: *Held*, not reversible error in violation of the constitutional right of the defendant to be present. *S. v. Hardee*, 534.

6. *Constitutional Law—Actions—Hypothetical Questions—Taxation—Appeal and Error.*—The courts will not decide upon the constitutionality of a statute, in this case the question of an inequality of taxation, in an action wherein it is not alleged or shown that the plaintiff has therein been deprived of any of his constitutional rights. *Wood v. Braswell*, 588.

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1. *Contracts—Interpretation—Audits—Accountants—Mistakes and Inaccuracies—Damages.*—Where there is a contract for the complete auditing of defendant's books, plaintiff to be paid per diem for work

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done, if there are mistakes and inaccuracies, such mistakes and inaccuracies are an element in the completeness and value of the audit, and the plaintiff is entitled under the contract to the amount per diem as agreed upon, less so much as it would take to reform the audit and make it accurate. *Mason v. Andrews*, 135.

2. *Same—Instructions—Appeal and Error.*—A charge on the foregoing contract that mistakes and inaccuracies in the audit be taken into consideration only as to the amount of time devoted to the work, and that such mistakes should not be considered upon the value of the audit, is reversible error. *Ibid.*

3. *Contracts, Written—Parol Evidence—Statute of Frauds.*—Where a contract concerning the subject-matter is not required to be in writing, and is partly written, parol evidence is admissible to show the unwritten part so that the contract in its entirety may be enforced when the unwritten part does not vary, add to or contradict that which has been reduced to writing. *Miller v. Farmers Federation*, 144.

4. *Same—Telegrams—Letters.*—Where a contract rests in parol in part, and the party to be charged has thereafter by letter or telegram confirmed this part of the contract, he may not avoid his obligation thereunder under the statute of frauds, and the entire contract will be considered as having been reduced to writing, and parol evidence concerning the subject-matter will be construed as having merged into the various writings. *Ibid.*

5. *Same—Fraud—Mistake—Parol Evidence.*—Only when a written contract is vitiated by fraud, mutual mistake or some other equitable element, is parol evidence admissible to contradict, add to or vary that which has been reduced to writing by the parties thereto. *Ibid.*

6. *Contracts—Breach — Evidence — Market Quotations—Telegrams.*—The price of a commodity as per the market quotation on the New York Exchange generally relied on by dealers therein, may be shown by telegrams and quotations thus received by a dealer local to the transaction, and the testimony of such dealer is competent evidence upon the trial. *Commander v. Smith*, 159.

7. *Contracts—Written Instruments—Parol Evidence—Architects.*—Where the owner has accepted the written proposition of an architect to prepare plans and specifications for the erection of a building on his lands, which the architect has accordingly done, and nothing has been specified in the writing as to the cost of the building contemplated, parol evidence which tends to show that the parties had agreed that the building was not to exceed a certain amount in its construction is not a contradiction of the written agreement, and it is competent for the owner to show in defense of the architect's action to recover for his services thus rendered, that the entire contract was not reduced to writing, and that the cost of the building exceeded the amount agreed upon. *Hite v. Aydlett*, 166.

8. *Same—Evidence—Reference to Other Writings.*—A "hand-book" relating to the subject-matter of a contract between the owner and the architect for the contemplated erection of a building on the former's

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land, is competent evidence when relevant to the inquiry in the action of the architect to recover for his services rendered, when expressly referred to in the written agreement between them and made a part thereof. *Ibid.*

9. *Contracts — Breach — Damages — Architect.*—Where the owner enters into a contract with an architect for the latter's furnishing plans and specifications for a building upon a percentage of the cost of the erection of the building, as a part of his compensation, he may recover the same in his action when the owner has wrongfully prevented his fulfillment of his contract. *Ibid.*

10. *Contracts—Rescission—Fraud—Deceit — Evidence—Presumptions—Instructions—Scienter—Appeal and Error.*—Where fraud or deceit is set up as a defense in an action to rescind a contract for the purchase of a piano from a dealer, in the seller's action to recover the purchase price, it is required that the defendant show that the plaintiff or his sales agent knew that the false representations relied on were knowingly or recklessly made to the defendant, that they were relied on by him, and reasonably induced him, without knowledge of their falsity to enter into the contract sued on, and an instruction to the jury that leaves out the principle relating to plaintiff's scienter under these circumstances, is reversible error, to the plaintiff's prejudice. *Corley Co. v. Griggs*, 171.

11. *Contracts—Cancellation — Evidence — Principal and Agent—Letters.*—Where a contract for the sale of merchandise is in writing and provides that no agreement of the agent will be binding upon the vendor when not therein stated, and the purchaser has signed and accepted the contract, evidence that the vendor had since agreed to the rescission or amendment of the contract is not sufficient when it consists of a letter purporting upon its face to have been written by the general manager of the seller to its sales agent to that effect, when the authority of the general manager to make this agreement is not otherwise shown. *Birler v. Britton*, 199.

12. *Same—Declarations.*—A letter purporting upon its face to have been written by the general manager of a vendor corporation to its sales agent, canceling an order which the latter has taken from a purchaser, is alone but a declaration of the agency of the general manager after the contract had been consummated, and is incompetent in the purchaser's behalf to show that the contract had been canceled, on the vendor's action against the purchaser upon the contract. *Ibid.*

13. *Contracts—Cancellation.*—A written contract may be abandoned or relinquished: (1) by agreement between the parties; (2) by conduct clearly indicating such purpose; (3) by the substitution of a new contract inconsistent therewith. *Ibid.*

14. *Contracts—Vendor and Purchaser—Delivery—Reasonable Time.*—Where a contract to deliver goods does not specify the time thereof, and the seller is advised that the use by the purchaser required promptness to be binding on the purchaser, they must be delivered to the seller within a reasonable time to comply with the contract. *Mesker v. West*, 230.

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15. *Contracts—Parol Evidence—Written Contracts.*—Where the defense to an action to recover upon a policy of fire insurance is that the policy was not delivered to the insured for nonpayment of premium, it goes to the question as to whether the contract had been made, and admits of parol evidence contradictory or at variance with the written contract in suit. *Dawson v. Ins. Co.*, 313.

16. *Contracts—Warranty—Failure of Consideration.*—While the vendor and purchaser of a commodity may agree upon the rule or measure of damages in relation to the latter's recovery upon the former's breach of warranty, express or implied, it will not apply where the goods sold are entirely valueless, and the consideration for the contract has completely failed. *Swift & Co. v. Aydlett*, 331.

17. *Contracts—Written Contracts—Interpretation—Questions of Law—Independent Contractors—Principal and Agent.*—The question as to whether a building is altered and repaired by one acting as an independent contractor, or as the agent for the owner, to be compensated by a percentage of the cost of the work is one of law, when the full terms of such employment are stated in a written contract unambiguously expressed. *Lumber Co. v. Motor Co.*, 377.

18. *Same—Respondeat Superior—Materialmen.*—Under a contract to remodel or repair a building for the owner upon a compensatory percentage based upon the cost, the owner to pay for all materials used upon statements rendered, and to retain supervision or control of the work as it progressed, the relationship of principal and agent is established, and not that of independent contractor, and the owner is directly responsible to those furnishing the materials in contemplation of the contract. *Ibid.*

19. *Contracts — Damages — Notice of Loss — Contemplation of Parties.*—Where a machine shop has represented that it is fully equipped and prepared to repair certain boxes used in the manufacture of cottonseed oil, and knew the purpose for which these boxes were wanted, and makes the repairs so that they were so faulty and defective as to make it impossible to use them without loss of time and greatly increased expense of manufacture: *Held*, the damages caused by such increase of cost are reasonably considered as having been within the contemplation of the parties, and are recoverable by the party sustaining them. *Iron Works Co. v. Cotton Oil Co.*, 442.

20. *Same—Speculative Damages.*—Where damages are recoverable for the faulty repair of machinery or implement used in the manufacture of certain products, the loss of time and increased cost of labor in their use as replaced, is an element of damages. *Ibid.*

21. *Contracts—Fraud — Deceit — Evidence—Actions — Defense—Burden of Proof.*—Where the vendee's defense to an action upon a contract of sale of goods is fraud and deceit, the burden of proof is on him to show it only by a preponderance of the evidence. *Oil and Grease Co. v. Averett*, 465.

22. *Same—Jury.*—It is reversible error to withhold from the jury the issue of fraud or deceit set up in defense of an action upon a contract of purchase of goods, when there is any legal evidence thereof construed in the light most favorable to the plaintiff. *Ibid.*

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23. *Same—Written Contracts—Parol Evidence.*—The rule that one who can read or write, with full opportunity to do so, may not sign the written instrument and afterwards seek to set it aside for fraud in its procurement contrary to the express terms of the instrument, does not apply when the person signs under the assurance of the vendor's agent that the writing expressed truly the terms they had agreed upon, and conditions at the time were such as to render the reading thereof of great inconvenience, and the signature of the purchaser was wrongfully secured upon the "honor" of the agent that it was correctly written. *Ibid.*

24. *Same—Rule of Prudent Man—Evidence—Questions for Jury.*—Upon the defense of fraud and deceit interposed to an action upon the purchase and sale of goods, and under the evidence the question is presented as to whether an ordinarily prudent man would have signed as purchaser under the circumstances of the case, an issue arises for the determination of the jury. *Ibid.*

25. *Contracts — Breach — Vendor and Purchaser.* — Where the issues submitted in an action for damages for defendant's refusal to accept and pay for on delivery at his place of business 500,000 feet of unmanufactured logs, at any time between certain dates, about ten months apart: *Held*, by the terms of the written contract, expressing the full terms of agreement, the plaintiff was required to furnish the logs in reasonable quantities of each delivery within the stated period. *Bryant v. Lumber Co.*, 607.

26. *Contracts — Breach — Vendor and Purchaser.* — Where the defendant has refused to accept and pay for logs to be furnished by plaintiff in reasonable quantities within a stated period, which the plaintiff at all times was able, ready and willing to deliver according to the terms of the agreement, and would have done so except for the defendant's refusal to receive them, it is a breach by defendant of his contract, entitling the plaintiff to damages. *Ibid.*

27. *Contracts—Breach—Damages—Vendor and Purchaser.*—Damages sustained by the seller of logs by the purchaser's breach in refusing to accept them according to his written contract, are not too indefinite and remote when the time for delivery extends over a few months, at a price named, and there is definite evidence as to cost the seller would have incurred therein. *Ibid.*

28. *Contracts—Vendor and Purchaser—Instructions to Deliver—Reasonable Time—Issues—Questions for Jury.*—Where a contract entered into between the vendor and purchaser of merchandise is that the former should ship the merchandise at the latter's request, and the defense to an action thereon is that the vendor shipped the goods without the purchaser's instructions, an issue of fact is raised for the determination of the jury as to whether the purchaser delayed giving his instructions beyond a reasonable time. *Helderman v. Mills Co.*, 627.

CONTRACTS, WRITTEN. See Contracts.

CONTRADICTION. See Negligence, 14.

CONTRIBUTORY NEGLIGENCE. See Master and Servant, 11, 14, 21, 23; Railroads, 5, 7; Municipal Corporations, 13; Negligence, 16, 18, 22.

CORPORATIONS. See Banks and Banking, 8, 11, 16, 29; Pleadings, 6; Removal of Causes, 6.

1. *Corporations—Fraud—Stockholders—Deeds and Conveyances.*—It is not a fatal misjoinder of both parties and causes for receiver of a corporation to sue husband and wife, the only stockholders, for mismanagement of corporate affairs, fraudulent misappropriation of funds against rights of creditors, and to set aside deed fraudulently made to them in entireties. *Carswell v. Talley*, 37.

2. *Corporations—Subscriptions—Shares of Stock—Statutes—Contracts—Fraud—"Blue Sky" Law.*—C. S., 6363, requiring that for the sale of certificates of stock the person or corporation offering them shall be licensed by the Insurance Commissioner, applies to sales of stock in a domestic corporation as well as a foreign one, irrespective of whether the same was either fraudulently procured or falls within the intent and meaning of the "Blue Sky" law. *Hotel Corporation v. Bell*, 620.

3. *Same—Actions.*—Where a subscription contract for purchase of shares of stock in a corporation was procured by one unauthorized by the provisions of C. S., 6363, 6367, or one who has not obtained a license from the Insurance Commissioner, the contract is not enforcible against such subscriber. *Ibid.*

4. *Same—Commissions—Principal and Agent.*—One who sells certificates of shares of stock in a corporation upon a commission basis without having obtained a license to do so as required by C. S., 6363, 6367, comes within the inhibition of the statute, though the sale may have been effected by another acting through such solicitor without compensation. As to whether one thus acting upon commission will be regarded as an agent, *Quœre? Ibid.*

CORRECTION. See Municipal Corporations, 10.

CORROBORATION. See Evidence, 5.

CORROBORATIVE EVIDENCE. See Rape, 2.

COSTS. See Banks and Banking, 18; Judgments, 12.

COUNSEL. See Appeal and Error, 5.

COUNTERCLAIM. See Actions, 1; Descent and Distribution, 2; Judgments, 11, 20; Pleadings, 15.

COUNTIES. See Game, 2; Taxation, 3, 4; Schools, 9; Banks and Banking, 25.

COUNTY BOARD. See Mandamus, 1; Schools, 2.

COUNTY COMMISSIONERS. See Taxation, 1; Highways, 7.

COUNTY COURTS. See Indictment, 1.

COUNTY SEATS. See Highways, 1.

COURTS. See Attachment, 1, 4, 5; Instructions, 1; Highways, 3; Taxation, 4; Constitutional Law, 4; Habeas Corpus, 2, 5; Tenants in Common, 3; Summons, 1; Judgments, 12; Master and Servant, 8; Removal of Causes, 7; Sate Highway Commission, 1.

1. *Courts—Military—Safety of Prisoner—Prejudice—Appeal and Error—Objection and Exceptions.*—Where for the protection of the prisoner on trial for rape, unexcepted to at the time the military authorities, under the Adjutant General, has quietly placed soldiers in the courtroom, and without the knowledge of the jury, have had all present examined for concealed weapons, and excluded a general attendance of the public, not connected with the case: *Held*, the prisoner's exception thereto thereafter, is untenable. *S. v. Mansell*, 20.

2. *Courts—Decisions—Reversal—Vested Rights—Supreme Court.*—A decision of the Supreme Court holding that it is necessary that a deed to lands be properly indexed for the purchaser to acquire title against a subsequent purchaser under a properly registered and indexed deed, will not affect the title acquired under a former decision of the Supreme Court holding to the contrary, and thus divest or impair the rights under the former decision of the Court thereon. *Wilkinson v. Wallace*, 156.

3. *Courts—Federal Decisions—Removal of Causes.*—The decisions of the Supreme Court of the United States are controlling upon the question of removal from the State to the Federal Court under the United States statute. *VanDyke v. Ins. Co.*, 206.

4. *Same—Insurance—Foreign Corporations—Domesticating Acts—Waiver. Held*, under the decisions of the Supreme Court of the United States binding upon the Supreme Court of North Carolina, a life insurance company of another state, having complied with the Federal statute, may remove an action against it involving more than three thousand dollars, etc., from the State to the Federal Court, and its compliance with the State domesticating statute does not waive or lose this right. *Ibid.*

CREDITORS. See Deeds and Conveyances, 3; Banks and Banking, 27.

CRIMINAL ACTION. See Instructions, 6.

CRIMINAL LAW. See Appeal and Error, 9; Robbery, 1; Instructions, 4, 13; Evidence, 4, 5, 25; Highways, 10; Rewards, 1; Judgments, 19.

1. *Criminal Law—Homicide—Evidence — Telegrams—Identification—Appeal and Error.*—Where the defendant is on trial for homicide, and there is evidence tending to show that a certain person whose evidence was of paramount importance to him, was in a certain city of another state, a telegram to her, while he was out on bail, signed with his Christian name, reading, "Don't talk if you are under arrest. Will see you soon," requires further identification than that of the agent of the telegraph company that it had been received for transmission at his office on the date stated, to be admissible in evidence against him, and its admission over the defendant's exception is reversible error. *S. v. Boswell*, 150.

2. *Criminal Law—Bigamy—Reputation — Evidence—Appeal and Error—Statutes.*—Evidence of rumors or neighborhood reports are not com-

CRIMINAL LAW—*Continued.*

petent on indictments for bigamy, bigamous cohabitation, or criminal conversation. *S. v. Jeffreys*, 189.

3. *Criminal Law—Assault—Indictment—Verdict—Lesser Degree of the Same Offense—Evidence—Instructions.*—While it is the better practice for the jury to specify which of the several offenses they find the defendant guilty of, when less offenses may be found against him under the indictment and evidence in the case, a general verdict of guilty will not be held for error, when it is capable of being correctly construed with reference to the greater offense charged in the indictment and supported by the evidence in the case, under a correct instruction of the law relating to it. *S. v. Lee*, 225.

4. *Criminal Law — Judgment Suspended — Good Behavior — Conditions Broken.*—The trial judge may suspend judgment upon conviction of the defendant of a criminal offense, upon condition of good behavior, etc., and subsequently impose and effectuate the sentence upon finding that the defendant had broken the condition. *S. v. Edwards*, 321.

5. *Criminal Law—Evidence—Declarations—Voluntary Confessions—Arrest —Presence of Officers—Appeal and Error.*—The written admissions of a prisoner of his guilt in committing the murder for which he was on trial, are not rendered involuntary merely because they were made in the presence of officers of the law, and their admission on the trial under such circumstances is not erroneous. *S. v. Gray*, 594.

6. *Criminal Law—Evidence—Declarations—Hearsay.*—Upon the trial of an action for unlawfully breaking into a storehouse with the intent to commit larceny, and the commitment of the offense of larceny, etc., where there is evidence that the defendant and another were found carrying a suitcase containing the stolen goods, with other evidence of their guilt, declarations of the other person so found, while escaping arrest, to the effect that he alone had committed the offense, are hearsay and incompetent. *S. v. Church*, 658.

7. *Criminal Law — Evidence — Barn Burning — Bloodhounds—Tracks.*— Where the reliability of bloodhounds has been testified to in following human beings by the scent, by one who has had experience with them: *Held*, on the trial of defendant for burning a barn, C. S., 4242, the tracing by the bloodhounds some two hours later of a track leading from the rear of the barn to defendant's residence, together with the identification of the track as that of defendant by one of his shoes, with evidence of motive, is sufficient evidence of guilt to take the case to the jury. *S. v. Thompson*, 704.

8. *Criminal Law — Seduction — Statutes — Evidence—Unsupported Testimony of Prosecutrix.*—In order to convict of the felony prescribed by C. S., 4339, the testimony of the prosecutrix must be supported by other legal evidence of facts and circumstances as to the carnal knowledge, etc. *S. v. Maness*, 708.

CROPS. See Fertilizers, 3.

CROSS-ACTION. See Actions, 1.

CROSS-EXAMINATION. See Evidence, 10, 20.

CROSSINGS. See Railroads, 4, 7.

CURATIVE STATUTES. See Deeds and Conveyances, 6.

CUSTODY. See Highways, 7.

DAMAGES. See Carriers, 1, 4, 6; Claim and Delivery, 2; Contracts, 1, 9, 19, 20, 27; Judgments, 3, 9; Banks and Banking, 16; Government, 1; Negligence, 6, 8, 12, 18, 20; Fertilizers, 2; Instructions, 10; Insurance, 14; Municipal Corporations, 10; Master and Servant, 11, 16; Arrest, 6.

1. *Damages—Verdict—Negligence—Appeal and Error.—Held*, while the jury's award of damages in this case was large for personal injury sued on caused by the defendant's negligence, the refusal of the trial judge to set it aside as excessive will not be disturbed on appeal. *Lane v. R. R.*, 288.

2. *Damages—Negligence—Automobiles.*—The measure of damages to the plaintiff's automobile proximately caused by the defendant's negligence in an automobile collision, is the difference in the market value of the car at the time, and what it would have brought after the collision, and evidence thereof is competent both immediately before and after the accident. *DeLaney v. Henderson-Gilmer Co.*, 648.

DANGER. See Master and Servant, 7, 24; Negligence, 19, 23.

DEATH. See Evidence, 21.

DEBT. See Equity, 4.

DEBTOR AND CREDITOR. See Banks and Banking, 12, 15, 24; Pleadings, 12.

1. *Debtor and Creditor—Pledges of Personal Property—Possession.*—A mere pledge of personalty for the payment of a debt, as distinguished from a chattel mortgage, passes the actual or constructive possession in the pledgee, or at most, a special property in the pledge with a right of retainer by the pledgee until the debt is paid. *Sneeden v. Nurnberger's Market*, 439.

2. *Same—Principal and Agent.*—Where the pledgee of personal property delivers the possession to the pledgor for the purpose of selling it and applying the proceeds to the payment of the debt, the pledgee is in constructive possession of the thing pledged under the principal of agency. *Ibid.*

3. *Same.*—Where the pledgee has assigned to him certain book accounts and other choses in action to be collected by the pledgor and paid to him in the event of the latter's failure to pay for supplies weekly furnished by the former in certain amounts as to value, and permits the pledgor to mingle the moneys thus collected with his general funds until condition broken, whether the written instrument containing this contract of sale be recorded as an unregistered chattel mortgage or mere pledge: *Held*, it is invalid as a preference against the general creditors of the pledgee. *Ibid.*

DECEASED PERSONS. See Wills, 12; Evidence, 9, 10.

DECEIT. See Contracts, 10, 21; Actions, 7; Escape, 1; Fraud, 1; Pleadings, 14.

DECISIONS. See Courts, 2.

DECLARATIONS. See Contracts, 12; Evidence, 2; Rape, 5; Criminal Law, 5, 6.

DEEDS AND CONVEYANCES. See Actions, 1; Corporations, 1; Estates, 2, 4; Mortgages, 1; Tenants in Common, 1, 3, 4, 8, 11; Equity, 1, 5; Wills, 11, 17; Highways, 11; Statutes, 11; Trusts, 1.

1. *Deeds and Conveyances — Description — Reference to Cases Pending and Maps—Evidence of Identification.*—A reservation in a deed to lands referring to records in a case pending in the same county as to a part, and to certain maps as to the other part reserved can be made more certain by the introduction of the case and maps referred to, and this makes untenable the objection that the reservation was void for vagueness of description. *Timber Co. v. Cozad*, 40.

2. *Deeds and Conveyances—Married Women—Purchase-Money Mortgage—Feme Covert—Constitution—Priority—Statutes.*—A purchase-money deed given by a *feme* covert, living with her husband, in which the husband does not join and which does not contain any privy examination of the wife is void because not complying with Art. X, sec. 6 of the Constitution, and C. S., 997; and a subsequent mortgage duly executed by them both, docketed after the writing purporting to be a purchase-money deed takes priority over such deed. *Hardy v. Abdallah*, 45.

3. *Deeds and Conveyances—Registration—Vendor and Purchaser—Statutes—Probate—Notice—Creditors.*—While a defective probate of a deed to lands appearing upon its face is ineffectual to pass title as against creditors, etc., it is otherwise when the probate appears to have been in conformity with law, regularly taken by a notary public in South Carolina, and there is no evidence that the grantee in the commissioner's deed under the forcelosure of a mortgage had actual notice of the defect. C. S., 3294, 3311. *Bank v. Tolbert*, 126.

4. *Same—Knowledge—Defective Probate—Burden of Proof.*—The burden of proof is on a creditor claiming a priority of lien by judgment over a purchaser at a foreclosure sale under a mortgage by reason of the purchaser's knowledge of a defective probate of the mortgage not appearing thereon in the office of the register of deeds, to show such knowledge. *Ibid.*

5. *Same—Notaries Public of Other States.*—While a probate of a mortgage taken in this State by a notary public of another state is defective, the purchaser at the mortgage sale will acquire by his deed the title as against a subsequent judgment creditor, when the probate appears of record in the office of the register of deeds in the county wherein the land is situate here to have been regularly taken in South Carolina, and there is no evidence that such purchaser had knowledge of the defect at or before the time he acquired his deed. This being an action for possession only, as to whether the purchaser at a mortgage sale has a right to redeem under the circumstances, *quære*, the same not presented in the instant case. *Ibid.*

6. *Deeds and Conveyances—Registration—Seal Omitted—Presumptions—Curative Statute.*—Where a deed under which a party claims title to land is not introduced, and recites that the seal of grantor was

DEEDS AND CONVEYANCES—*Continued.*

affixed, the introduction of the book of the register of deeds not showing the seal is not conclusive that the seal was not affixed to the instrument itself. It further appears that the defect in this respect, if any, was cured by chapter 64, Public-Local Laws of 1924. *Roberts v. Saunders*, 191.

7. *Deeds and Conveyances—Tax Deeds—Mortgages—Statutes.*—In order to the validity of a tax deed as against one who has since acquired title to the lands by foreclosure sale under the power in a mortgage, existing at the time, the notice required by C. S., 8028 must have been given the mortgagee, the land must be sufficiently described in the tax collector's certificate, and in the plaintiff's affidavit, and the statutory notice properly shown to have been given the defendant. *Dunn v. Jones*, 251.

8. *Deeds and Conveyances—After-Acquired Title—Estoppel.*—Where one takes a defeasible fee in lands by devise, conveys the fee-simple title with full covenants and warranty, and afterwards acquires the fee, he is estopped as against his grantee and those claiming under him from denying his title at the time of his deed. *James v. Griffin*, 285.

9. *Deeds and Conveyances—Railroads—Easements.*—A railroad company may convey a good fee-simple title to lands conveyed to it by its predecessor, admittedly the owner, that were included in the operation of the railroad system, and as such in the operation of the railroad property. *Storage Co. v. Bunn*, 328.

10. *Deeds and Conveyances—Clerical Error in Reciting the Receipt of Consideration.*—Where a deed conveys certain lands, it will not be declared ineffectual because of a recitation therein that the consideration was paid to the grantee, when it clearly appears from the other parts of the deed, construed as a whole, that the grantor received it. *Boyd v. Campbell*, 398.

11. *Deeds and Conveyances — Interpretation — Intent.*—Technical rules in interpreting a conveyance of lands that will defeat the obvious intent of the parties as gathered from the entire instrument, will not prevail unless such intent is repugnant to the terms of the grant or is in conflict with some canon of construction or some settled rule of law. *Ibid.*

12. *Deeds and Conveyances — Repugnant Clauses—Interpretation.*—Where there are repugnant clauses appearing in a deed to lands, nothing else appearing as controlling their intepretation, the last will be rejected in favor of the former one. *Ibid.*

13. *Deeds and Conveyances—Contracts—Timber.*—Deeds for standing timber conveys a fee-simple interest in such timber determinable as to all such timber that is not cut and removed within the time specified in the contract. *Mote v. Lumber Co.*, 460.

14. *Same—Extension Period—Option—Payment of Consideration.*—Where a deed conveys timber growing upon land to be cut and removed within a stated time, with extension periods upon a further consideration to be paid within each of such periods or at stated times, the contract for each such period is but an option until the consideration is paid, and such consideration so to be paid, is necessary for the acquisition by the vendee of the extension rights accorded him. *Ibid.*

DEEDS AND CONVEYANCES—*Continued.*

15. *Deeds and Conveyances—Principal and Agent—Parol Authority to Fill in Blanks.*—In order to create a valid agency to sell land and make a conveyance, there must be a writing under seal creating the agency, and where a deed has been duly executed excepting the amount of the consideration and the name of the grantee, and delivered to another to fill in the blanks when a purchaser was found, the authority thus conferred would rest in parol, and therefore the deed thus made would be invalid as a deed. *Bank v. Wimbish*, 552.

16. *Same—Equity—Contracts to Convey Lands.*—While a deed with the amount of consideration and the name of the grantee left out to be filled in by an agent upon his finding a purchaser, will not when so filled out operate as a deed, it is in equity enforceable by the purchaser so found, and upon the filling in of the blanks is a valid contract to convey. *Ibid.*

17. *Deeds and Conveyances—Lands—Specific Descriptions—Questions of Law—Location—Questions for Jury.*—Where the interpretation of the deed conveying lands depends as to its including the *locus in quo* upon the point of beginning, the specific and more clear definition of this point will control a more general one as a matter of law for the court, and the location of this point on the lands is a question for the jury under conflicting evidence. *Von Herff v. Richardson*, 595.

18. *Deeds and Conveyances—Probate—Justices of the Peace—Clerks of Court—Certificate for Registration—Statutes.*—Where a justice of the peace has properly and in due form taken the acknowledgment of the grantor and his wife to a deed to lands, and the clerk of the court has failed or omitted to sign his name to the certificate for registration, the registration of the instrument is no evidence that the clerk or his deputy has complied with the provisions of 3 C. S., 3305, requiring the clerk, etc., to adjudicate the sufficiency of the certificate of the justice of the peace, or sufficient to permit a copy of such deed to be used in evidence under the provisions of C. S., 1763. The curative statutes, 3331; 3 C. S., 3366 (a), (b), (c), (d), have no application. *Woodlief v. Woodlief*, 634.

19. *Deeds and Conveyances—Restraint on Alienation—Fee-Simple Title.*—The condition expressed in a deed to lands that they "cannot be conveyed until the third generation," is a restraint on alienation and inoperative, and the grantee acquires the fee. *Welch v. Murdock*, 709.

20. *Deeds and Conveyances—Trusts—Principal and Agent—Title.*—A deed to lands made to the grantee as "trustee" or "agent" immediately following his name, without further indication that he is to take in a representative capacity appearing thereon, conveys the fee-simple title to the grantee, individually, the words "trustee" or "agent" being regarded as words "*descriptio personæ.*" *Freeman v. Rose*, 732.

21. *Deeds and Conveyances—Warranty—Eviction.*—In order to hold the grantor in a deed liable upon his warranty therein, it must be shown by the grantee that his possession thereunder had been disturbed by eviction, etc. *Lumber Co. v. Buchanan*, 772.

DEFAULT. See Judgments, 2, 3, 10, 18, 21; Election of Remedies, 1; Appeal and Error, 23; Principal and Surety, 1, 2, 3.

DEFECTS. See Master and Servant, 6.

DEGREES OF CRIME. See Homicide, 5; Robbery, 2.

DELIVERY. See Contracts, 14, 28; Insurance, 7, 9.

DEMURRER. See Actions, 3; Pleadings, 1, 3, 4, 8, 9, 13; Banks and Banking, 23; Insurance, 16; Schools, 8.

DEPOSITS. See Banks and Banking, 22, 24, 25; Descent and Distribution, 2.

DEPOSITIONS. See Evidence, 1, 3.

DEPOTS. See Carriers, 5.

DESCENT AND DISTRIBUTION. See Wills, 3, 13; Estates, 4.

1. *Descent and Distribution—Mortgages—Purchase Price—Personalty—Statutes.*—Where a person dies intestate leaving an estate of lands upon which there were mortgages to secure the purchase price, and also personal property, the personalty should first be sold to satisfy the debts of the decedent before encroaching upon the real property descendible to the heirs, under the provisions of our statute, C. S., 74. *Moseley v. Moseley*, 243.

2. *Descent and Distribution—Statutes—Husband and Wife—Banks and Banking—Counterclaim—Offset—Receivers—Deposits.*—Where a husband is entitled to a child's distributive part in the personal property of his deceased wife, 3 C. S., 137(8), and she had a certain amount of money deposited in a bank since becoming insolvent and in a receiver's hands, he may not successfully set up this interest under the provisions of C. S., 521, as a counterclaim against his note, in an action by the receiver therein, until his wife's administrator has accounted for his trust or distributed the assets of his intestate's estate. *Williams v. Williams*, 405.

3. *Same—Executors and Administrators.*—Under the provisions of C. S., 521, allowing a counterclaim to be set up in an action arising on contract, matters arising also on contract between the parties, the subject of the counterclaim, must have existed at the time of bringing the action when this defense is relied upon. *Ibid.*

4. *Same—Insolvency.*—Where a bank has become insolvent and in the hands of a receiver, the right of its debtor to successfully set up, as a counterclaim in an action by the receiver on his note, an interest in a deposit of his deceased wife he claims as a distributee under 3 C. S., 137(8), is governed by the conditions existing at the time of the insolvency of the bank. *Ibid.*

DESCRIPTION. See Deeds and Conveyances, 1, 17; Mortgages, 1.

DETINUE. See Judgments, 9.

DEVISE. See Wills, 9, 13, 15, 16, 17.

DIRECTING VERDICT. See Instructions, 2, 4.

DIRECTORS. See Banks and Banking, 6, 16, 26.

DISCHARGE. See Banks and Banking, 18; Bills and Notes, 20.

DISCRETION. See Highways, 1; State Highway Commission, 1, 2; Habeas Corpus, 5; Constitutional Law, 4.

DISCRETION OF COURTS. See Habeas Corpus, 5.

DISCRIMINATION. See Game, 2; Constitutional Law, 2, 3; Statutes, 8.

DISMISSAL. See Actions, 3, 5; Appeal and Error, 6, 19; Insurance, 5.

DISTRIBUTION. See Garnishment, 1; Banks and Banking, 15, 27; Mechanics' Liens, 2; Drainage Districts, 1.

DISTRICTS. See Judgments, 6.

DIVERSE CITIZENSHIP. See Removal of Causes, 5, 8.

DIVISION. See Tenants in Common, 3.

DOCKETS. See Appeal and Error, 2, 4, 31.

DOMESTIC CORPORATIONS. See Taxation, 8.

DOWER. See Estates, 3.

DRAINAGE. See Carriers, 4.

1. *Drainage Districts—Assessments—Drainage Commissioners—Distribution of Surplus Funds—Statutes.*—Where a drainage district of a county having assessed the property owners therein for improvements, and when having completed the same there is a surplus in the hands of the county treasurer, the board of drainage commissioners may, upon the exercise of a sound discretion, and in good faith, determine that the fund on hand is not necessary for further disbursements for the benefit of the district according to the plan adopted and distribute the same proportionately among those assessed in accordance with law, especially when such owners have thereto agreed. C. S., 5372(3). *Foil v. Drainage Comrs.*, 652.

2. *Same—Executors and Administrators—Heirs at Law.*—Where, after completing a drainage project the drainage commissioners of the district have resolved to distribute a surplus in the hands of the county treasurer to those whose property has been assessed for the purpose, the part thereof of a deceased person, who had conveyed the land, is not an appurtenance to the land so conveyed, but passes as personal property to his personal representative, and not directly to his heirs at law. *Ibid.*

DUE CARE. See Negligence, 23.

DUE COURSE. See Bills and Notes, 1, 23.

DUTIES. See Master and Servant, 1, 7, 18, 20.

DYING DECLARATIONS. See Evidence, 20.

EARNINGS. See Negligence, 11.

EASEMENTS. See Carriers, 4; Railroads, 1; Deeds and Conveyances, 9.

EDUCATION. See Schools, 2.

ELECTIONS. See Actions, 2; Mandamus, 1, 2; Schools, 9.

ELECTION OF REMEDIES. See Appeal and Error, 27.

1. *Election of Remedies—Principal and Agent—Undisclosed Principal—Judgment by Default Against Agent—Pleadings—Issues—Independent Contractor.*—Where a material furnisher for a building has sued the owner as an undisclosed principal as well as his agent who purchased the material, and judgment by default in his favor has been taken against the agent, he is not thereby barred of his right of recovery against the principal, under the doctrine of election of remedies, to prosecute his action to final judgment against the principal, the cause having for this purpose been retained and proceeded with under the principal's denial of the agency, but setting up the defense of independent contractor. *Lumber Co. v. Motor Co.*, 378.

2. *Election of Remedies—Trials—Appeal and Error—Burden of Proof—Record.*—While the plaintiff in an action to recover damages for a negligent personal injury may not elect upon the trial to hold only one of the two defendants liable, and upon appeal seek to hold the other liable also, the record on appeal must show that he had chosen to try the case in the Superior Court upon the theory that only the negligence of one of the defendants caused the injury in suit. *Shipp v. Stage Lines*, 475.

ELECTRICITY. See Negligence, 23.

EMPLOYER AND EMPLOYEE. See Master and Servant, 1, 3, 6, 8, 13, 17, 18, 20, 22, 23, 24, 25; Negligence, 1, 2, 17, 24, 25; Evidence, 16.

ENDORSEMENT. See Bills and Notes, 1, 5, 18, 19, 20, 21, 22.

ENTRY. See Forcible Trespass, 1.

EQUALITY. See Principal and Surety, 5.

EQUITY. See Mechanics' Liens, 3; Municipal Corporations, 9; Principal and Surety, 5; Deeds and Conveyances, 16; Highways, 2; Bills and Notes, 5, 8, 9; Estates, 2; Banks and Banking, 6; Pleadings, 2, 3.

1. *Equity—Reformation of Instruments—Deeds and Conveyances—Mistake—Burden of Proof.*—Equity will not decree the reformation of a deed for the mistake of the draughtsman in not incorporating conditions in the instrument as both the parties had directed, unless the party seeking this relief establishes by strong, clear and cogent proof that the conditions omitted from the deed were substantial and material, and that it was an omission due solely to the mistake of the draughtsman, and upon which both parties had agreed. *Crawford v. Willoughby*, 269.

2. *Same—Evidence—Appeal and Error.*—Where the grantor in a deed seeks to have it reformed so as to include a condition subsequent that the grantee was to take in remainder after the reservation of a life estate, upon the grantee's supporting him or providing him a home in his old age, etc., evidence tending to show that he had consulted an attorney who drew the conveyance as written, who had read it over to him after his stenographer had written it, that it was written in accordance with instructions given; that he then executed it and carried it away and delivered it to the grantee, and the only evidence in his favor testified to by himself found against him by the jury,

EQUITY—*Continued.*

was that he was too drunk to understand what he was doing, is insufficient to support a judgment ordering a reformation of the instrument rendered in the Superior Court. *Ibid.*

3. *Equity — Subrogation.* — Equitable subrogation cannot be successfully sought when the one to whose rights this equity is sought has no legal claim upon the subject-matter. *Mfg. Co. v. Blaylock*, 408.

4. *Equity—Principal and Surety—Subrogation—Payment of Principal's Debt.*—Where the equitable right of subrogation arises to the surety on a contractor's bond for the erection of a public school building by a municipality, it is required that the debt be paid in full. *Ibid.*

5. *Equity—Estoppel—Deeds and Conveyances—Timber Deeds—Extension Periods.*—Where the rights to cut and remove timber growing upon lands are acquired by purchase and conveyance from the original grantee, who agrees and covenants to pay the consideration for the extension periods therein granted, the vendor is estopped in equity from claiming forfeiture of the extension period and a revesting of the title in himself, by asserting to his vendee's purchaser that all moneys necessary to secure this extension has been paid by the original grantee and knowingly permitting extensive operations to be made for the continued cutting and removal of the timber. *Mote v. Lumber Co.*, 460.

6. *Same — Recovery of Extension Price — Consideration.*—Where equity will estop the grantor in a timber deed from enforcing a forfeiture of the rights of the purchaser of his vendee in cutting and removing the timber, etc., because of his vendee's failure to pay the consideration of the extension period, the vendor may recover the amount of this consideration from such purchaser. *Ibid.*

7. *Equity—Cancellation—Bills and Notes—Consideration—Negotiable Instruments—Statutes.*—The endorser of a note may resort to the equity jurisdiction of our courts which is preventive of injustice as well as remedial, to cancel a negotiable instrument in the hands of his immediate endorsee for a total failure of consideration, and under our statute, C. S., 2982, this remedy is available whether the misrepresentation of value was innocently or knowingly made. *Lumber Co. v. Buchanan*, 771.

ESCAPE.

1. *Escape—Evidence—Appearance Bond—Fraudulent Representation to Jailer—Deceit—Nonsuit.*—A conviction cannot be had for assisting a prisoner to escape from jail where he was lawfully confined upon evidence only tending to show that the defendants were sureties on the prisoner's bond for his appearance before the Superior Court for trial, and his release was obtained by the defendant's falsely representing to the jailer that the clerk had requested them to instruct the jailer to release the prisoner, and that the bond they had signed and then presented had been accepted by the clerk, and the prisoner then was called and discharged from custody after he had signed the bond as principal, without knowledge of the deceit practiced upon the jailer. C. S., 4643. *S. v. Pace*, 780.

ESTATES. See Wills, 2, 8, 9, 13, 16, 17, 19, 20.

1. *Estates — Fee Conditional — Contingent Remainders — Statutes.* — An estate to the testator's wife for life, and at her death to be equally divided among four of his children by name, and if any of the children die without issue their proportional parts to the testator's lineal descendants: *Held*, the children take a fee conditional at the death of the testator, subject to be defeated upon the death of any of them during the continuance of the life estate, and upon the death of one or more of them, his or their share vests in the other surviving children of the testator. C. S., 1737. *Yarn Co. v. Dewstoe*, 121.

2. *Same—Deeds and Conveyances—Equity.*—Where the children of the testator take by devise a defeasible title in the lands and attempt to convey the fee-simple title to a part thereof, when the contingency happens that vests a fee-simple title in them, and the remaining part of the land is sufficient, their part of the land thus taken by devise will be decreed to them from the lands not subject to their conveyance. *Ibid.*

3. *Same—Dower—Judgment—Appeal and Error—Procedure.*—The widow of one acquiring a defeasible fee-simple title may have her homestead allotted therein, and where it appears on appeal to the Supreme Court that such relief has been granted to her, and no allotment thereof has been made, from which she has not appealed, the scope and extent of her dower interest may be left open for its ascertainment in a formal proceeding for that purpose. *Ibid.*

4. *Estates—Remainders—Contingent Interest—Deeds and Conveyances—Release—Descendible Estate.*—A contingent interest in land is generally descendible, and may be released by the contingent remainderman if specified in the instrument creating it, and he can be clearly identified. *James v. Griffin*, 285.

5. *Same.*—A devise of an estate for life to the mother of the testatrix, upon her death to the daughter of testatrix, her heirs, executors and administrators, but in the event the daughter should die in the testatrix's lifetime or in the lifetime of the testatrix's mother, or thereafter without issue of her body living at the time of her death, then to the husband of the testatrix: *Held*, the daughter acquired a fee-simple title defeasible upon her dying without issue of her body living at the time of her death, and the husband being specified and certain as to one taking upon this contingency, a deed from him to the daughter will convey his interest to her, and the daughter's deed to another a fee-simple title. *Ibid.*

6. *Estates—Tenants in Common—Fee Tail—Statutes—Fee Simple.*—While an estate conveyed to C. and his children executed and delivered when C. has living children conveys to the grantees as tenants in common, it is different when at that time C. has no children, and in the latter event an estate tail is conveyed which, by our statute is converted into a fee simple. C. S., 1734. *Boyd v. Campbell*, 398.

7. *Estates—Remainders -Fee—Limitation After a Fee—Conditions.*—An estate may not be limited after a prior estate granted in fee except by executory devise or making the first estate terminable upon a condition upon which the latter limitation becomes effectual. *Ibid.*

ESTATES—*Continued.*

8. *Same—Uses and Trusts—Shifting Uses.*—Where an estate in fee is limited after the conveyance in fee upon condition or the happening of a contingency, the latter limitation may become effective under the doctrine of shifting uses from the first taker to the latter one. *Ibid.*

9. *Same—Estates for Life.*—Where the first taker under the conveyance by deed of an estate takes the fee simple, a fee in the same lands may not be limited to take effect thereafter, there being no preceding life estate created by the instrument or condition broken to make it effective. *Ibid.*

10. *Estates—Rule in Shelley's Case—Canons of Descent.*—The rule in *Shelley's case* is a rule of property as well as a rule of law, and applies when there is an estate of freehold in the ancestor of the first taker who has acquired by, through or in consequence of the same assurance which created a limitation to his heirs, used in the conveyance in its technical sense as importing a class of persons to take indefinitely in succession from generation to generation according to the canons of descent, and who take an estate of the same character or quality as the first taker, either legal or equitable, the limitation over being of an inheritance in fee or in tail. *Benton v. Baucom,* 630.

11. *Same—Reason for the Rule.*—The present existence of the rule in *Shelley's case* is for the purpose of preventing the tying up of the title to real property and to place it in channels of commerce, and the doctrine of *cessat ratione cessat lex ipsa* (the law ceasing with the reason therefor) does not apply. *Ibid.*

12. *Same.*—Under the provisions of a devise of a life estate to the testatrix's stepdaughter after the life of her mother, then to her "lawful heirs if any, and if not to the testatrix's own children or their heirs," a fee-simple title is conveyed to the stepdaughter under the rule in *Shelley's case. Ibid.*

13. *Estates — Contingent Remainders — Vested Estates—Wills.*—Where it appears from a proper interpretation of a will that the testator's nephew is the primary object of his bounty to the ulterior takers in remainder, and it is expressed in the will that those in remainder take upon condition that the nephew should die without leaving child or children, the birth of a lawful child to the testator fulfills the condition imposed, and without further restrictive expressions the nephew then takes the fee-simple title. *Walker v. Trollinger,* 744.

ESTATE BY ENTIRETIES. See Tenants in Common, 4.

ESTOPPEL. See Deeds and Conveyances, 8; Judgments, 8, 9; Tenants in Common, 6; Equity, 5; Removal of Causes, 7.

1. *Estoppel—Actions—Judgments—Agreement of Parties—Issues.*—Estoppel by a former judgment may be successfully interposed as a defense to an action between the same parties and their privies, upon the same subject-matter of litigation, and upon the same issues, and upon any question upon which the parties to the former action may have agreed that should be embraced within the issues determined and properly appearing in the records of the former trial in which the judgment was rendered. *Hardison v. Everett,* 371.

ESTOPPEL—*Continued.*

2. *Same—Title—Record in Former Action—Privies—Successor in Title.*—Where the parties to an action have agreed that a certain lot of land shall be determined by the answer to the issues involving the true dividing line between adjoining owners, the judgment therein rendered may not successfully be set up as an estoppel between the successor in title of a party to the former action, when by reference to the former record it appears that the present controversy involves title to lands not embraced in the agreement of the parties to the former action. *Ibid.*

EVICTION. See Deeds and Conveyances, 21.

EVIDENCE. See Negligence, 4, 9, 10, 12, 14, 16, 17, 19, 20, 23, 25; Rape, 1, 2, 4; Deeds and Conveyances, 1; Railroads, 5; Reference, 3, 6; Banks and Banking, 3, 9, 13, 29; Bills and Notes, 3, 18; Appeal and Error, 1, 10, 15, 25, 26, 30; Insurance, 1, 8, 19, 20; Carriers, 1, 2, 3, 5, 7; Homicide, 1, 4, 5, 6; Instructions, 1, 2, 4, 8; Principal and Surety, 2; Arrest, 1, 4; Pleadings, 11, 14; Contracts, 6, 8, 10, 11, 21, 24; Criminal Law, 1, 2, 3, 5, 6, 7, 8; Injunction, 1; Robbery, 2; Equity, 2; Limitation of Actions, 1; Wills, 12, 14; Fertilizers, 2, 3; Issues, 1, 3; Husband and Wife, 1, 3; Benevolent Societies, 1; Highways, 9; Rewards, 1; Fraud, 1; Master and Servant, 2, 3, 9, 13, 17, 22; Municipal Corporations, 12, 14; Intoxicating Liquor, 1, 2; Conflict of Laws, 1; Trusts, 2; Escape, 1.

1. *Evidence—Depositions.*—Where the depositions used upon the trial of an action appears to have been duly taken in accordance with law, it will not be held defective as to certain parts written by another in the presence of the commissioner, duly certified by him, signed by the witnesses, and having in all respects been duly taken. *Bixler v. Britton*, 199.

2. *Evidence—Declarations—Boundaries—Ante Litem Motam—Interest—Lands—Title.*—In an action involving the true boundary line between adjoining owners of land, declarations of a former owner before any dispute arose, made against his interest while the defendant was in possession, who had no motive to falsify the facts declared, and was aware of the effect of his declarations, and the declarant was dead at the time his declarations were offered in evidence, are admissible. *Carr v. Bizzell*, 212.

3. *Evidence—Depositions—Notice—Waiver.*—Where the plaintiff resists defendant's motion for the continuance of the trial of the case then in progress on account of the sickness of a witness in the same city, but in consequence of his offer to waive the formality of notice to take the witness's deposition, the court orders the taking of the deposition in order that the trial may proceed, the plaintiff's waiver does not include his right to object upon the trial at his first opportunity to the competency of portions of the evidence so taken, and the ruling of the court thereon in his favor is not erroneous. *Lane v. R. R.*, 287.

4. *Evidence—Nonsuit—Criminal Law.*—Where the assault and the identity of the prisoner have been directly testified to, defendant's motion as of nonsuit upon the evidence is properly denied, upon his defense of an alibi. *S. v. Jeffreys*, 318.

EVIDENCE—*Continued.*

5. *Evidence—Corroboration—Criminal Law.—Held,* in this action for rape, the admission of certain testimony tending to impeach the defendant's testimony, was not erroneous. *Ibid.*

6. *Evidence—Character—Substantive Evidence.*—The evidence of the good character of a witness who has testified for the defendant in an action for rape, cannot be considered as substantive evidence to sustain an alibi he has set up as a defense. *Ibid.*

7. *Evidence—Conjecture.*—Evidence is insufficient to take the case to the jury which merely raises a conjecture or suspicion. *Jordan v. R. R.*, 375.

8. *Evidence—Negligence — Automobiles — Collisions.*—Where involved in the issue of negligence, the question arises as to the position upon the highway of plaintiff's and defendant's automobiles at the time of a collision, it is competent for a witness to testify where he saw them immediately after the occurrence, when there is further evidence that their position had not been since changed. *Mitchell v. Atkins*, 376.

9. *Evidence — Deceased Persons — Transactions and Communications — Statutes.*—Where, in a suit seeking equitable relief of reformation of a wife's deed of lands to her husband, evidence that the wife in the presence of her husband delivered the conveyance claimed by her to have been executed by the mistake of the justice of the peace, to said justice, who then took her acknowledgment, is not of a personal communication or transaction, etc., with her deceased husband as inhibited by C. S., 1795. *Smith v. Moore*, 142 N. C., p. 277, as to the question of principal and agency, cited and distinguished. *Barton v. Barton*, 453.

10. *Evidence—Deceased Persons — Cross-Examination—Statutes—Transactions and Communications—Appeal and Error—Objections and Exceptions.*—It is incompetent as a transaction with a deceased person (C. S., 1795), in an action against his estate to recover for services rendered him under a contract, for the plaintiff to testify as to personal services rendered by her as coming within her demand for damages, though brought out on her cross-examination, when the answer so elicited was not necessarily called for and exception was duly entered. *Pulliam v. Hege*, 459.

11. *Evidence—Motions—Nonsuit—Statutes.*—On a motion to nonsuit, the evidence is to be taken in the light most favorable to the plaintiff, and the benefit given him of any reasonable intendment, and any inference to be drawn therefrom. *Inge v. R. R.*, 522.

12. *Evidence — Res Ipsa Loquitur — Soft Drinks — Injurious Substances Causing Sickness.*—Where the plaintiff seeks to recover damages for sickness caused by the defendant's negligence in selling him ale to drink in a bottle containing a deleterious or injurious substance, it is required of him to show directly by his evidence that such ingredient was contained in the bottle he had bought, and it may not be inferred by the fact that after drinking the ale he became sick and was laid up, the doctrine of *res ipsa loquitur* not applying. *Lamb v. Boyles*, 542.

EVIDENCE—*Continued.*

13. *Same—Conflicting Inferences.*—Where the evidence admits of two legal inferences, both in favor of or against the plaintiff, the doctrine of *res ipsa loquitur* is not available to him. *Ibid.*

14. *Evidence—Witnesses—Impeachment—Statements.*—Upon an issue arising under the terms of an accident policy of insurance, as to whether the insured was sober at the time of the accident in suit, a statement in writing and signed by plaintiff's witness is not competent as impeaching evidence which does not contradict his testimony, but only in that respect is the opinion of another. *Moore v. Ins. Co.*, 580.

15. *Evidence—Insurance, Accident—Policy—Contracts—Drink—Appeal and Error.*—Where the defense to an action upon an automobile policy of accident insurance is under a provision in the policy exempting the insurer from liability if the plaintiff was not sober, the condition of the plaintiff in this respect is to be ascertained at the time of the injury, and not dependent upon his usual state of insobriety, or whether he had previously received treatment for an alcoholic appetite at an institution for that purpose, and such evidence is properly excluded. *Ibid.*

16. *Evidence—Nonsuit—Statutes—Master and Servant—Employer and Employee—Safe Place to Work.*—Where an independent contractor has furnished his employee a safe place to go to and from his work for the installation of a steam-heating plant of a building, and without the knowledge of the contractor, the employee on one occasion has voluntarily chosen an unsafe way to leave the work for the dinner hour with knowledge of the safe one by walking diagonally across loose rafters unprovided with a plank or other methods for this purpose, the danger of which he could readily perceive and the condition of which he was aware, and there is no other evidence of the employer's negligence: *Held*, a judgment as of nonsuit should have been entered upon the defendant's motion under the provisions of our statute, C. S., 567. *Bennett v. Powers*, 599.

17. *Evidence—Questions for Jury—Issues.*—Where the evidence is conflicting in an action to recover damages from a passenger auto-bus line for a personal injury alleged to have been negligently inflicted on the plaintiff while a passenger thereon, an issue is raised for the jury to determine. *Myers v. Kirk*, 701.

18. *Evidence—Attorney and Client.*—Representations of an attorney that he was acting for the defendant corporation in settling claims against it, made in the presence of defendant's president, and not denied by him, is sufficient evidence thereof to be submitted to the jury. *Ibid.*

19. *Evidence — Questions and Answers — Appeal and Error — Harmless Error.*—An inaccurate question asked a witness will not disturb the verdict finding the defendant guilty of a criminal offense, when it is cured by the answer of the witness thereto. *S. v. Thompson*, 705.

20. *Evidence—Dying Declarations — Witnesses — Oath—Cross-examination.* While a witness in a criminal action is required to testify under oath and be subjected to cross-examination, dying declarations are an exception to the rule, the apprehension of death being at least of equal solemnity as an oath, and the necessity of the case excluding the cross-examination. *S. v. Franklin*, 723.

EVIDENCE—*Continued.*

21. *Same—Reasonable Apprehension of Death.*—A declaration made in the expectancy of immediate death is not inadmissible because of the fact that death did not occur until three days after the declaration was made. *Ibid.*

22. *Same—Motive.—Semble,* the declarations of the declarant as to the prisoner's motive in killing him are competent evidence under the facts of this case. *Ibid.*

23. *Same—Verdict—Harmless Error—Appeal and Error.*—Where it is contended that the dying declarations included the evidence of the motive of the prisoner in inflicting on the deceased the deadly wound: *Held,* the motive is not essential to a conviction of manslaughter, and, if erroneously admitted, a verdict of manslaughter cures the error, together with the exclusion of evidence offered in rebuttal by defendant. *Ibid.*

24. *Evidence—Negligence—Issues—Questions of Law—Questions of Fact—Jury—Instructions.*—Where all the evidence upon the trial of a personal injury case wherein negligence of defendant is alleged, admits of only one inference, the question of negligence is one of law, and where therefrom more than one inference of the material ingredients of negligence arise, the fact of negligence is for the determination of the jury under proper instructions of the law from the court. *Clinard v. Electric Co.*, 736.

25. *Evidence—Nonsuit—Criminal Law.*—Upon a motion as of nonsuit upon the evidence in a criminal case, the evidence is to be taken in the light most favorable to the State, with all reasonable inferences therefrom resolved in its favor. *S. v. Pierce*, 767.

26. *Evidence—Trials—Appeal and Error.*—Evidence erroneously admitted on direct examination is not reversible error when again brought out on cross-examination, or evidence of the same character is admitted without objection from the appellant. *Watson v. Tanning Co.*, 790.

EXAMINATION. See Insurance, 17; Statutes, 10.

EXCEPTIONS. See Reference, 3.

EXCUSABLE NEGLECT. See Judgments, 14, 17.

EXECUTORS AND ADMINISTRATORS. See Wills, 12; Descent and Distribution, 3; Drainage Districts, 2.

1. *Executors and Administrators—Statutes—Assets—Creditors—Petition to Sell Lands—Actions—Procedure.*—Where the executor of the decedent has proceeded under the provisions of C. S., 74, to sell the realty to make assets to pay debts, and has filed his petition as required by C. S., 79, it being made to appear that the personalty was insufficient, and the proceedings are still pending, the surplus of the sale is to be regarded as realty to be distributed among the devisees, C. S., 56, and a judgment creditor of a devisee desiring to attack a debt set forth in the petition as being in fraud, and thus diminishing the distributive share of the estate, he should do so in these proceedings, and not by independent action. *Wadford v. Davis*, 484.

EXECUTORS AND ADMINISTRATORS—*Continued.*

2. *Same—Ex Parte Proceedings—Parties — Judgments—Independent Actions.*—Where the executor has filed a proper petition for the sale of realty to pay debts (C. S., 79), the judgment creditor interested in the surplus, is not made parties, and desiring to contest one of the debts set out in the partition for fraud, may make themselves parties and proceed therein accordingly, the procedure being *ex parte* on the part of the executor (C. S., 759), and an independent action by them will not lie for fraud until after final judgment in the proceedings. *Ibid.*

3. *Same—Presumptions.*—The regularity of the proceedings by an executor to sell lands to make assets to pay debts due by the estate will be presumed in the absence of evidence to the contrary. C. S., 74, 79, 56, 759. *Ibid.*

4. *Same—Interveners.*—The judgment creditors of the decedent, having an interest in the surplus of the sale of realty to make assets to pay debts, are such necessary or proper parties as to entitle them to intervene in the proceedings of the executor, and make themselves parties, before final judgment. C. S., 456. *Ibid.*

EXEMPTIONS. See Taxation, 7.

EX PARTE PROCEEDINGS. See Executors and Administrators, 2.

EXPERTS. See Homicide, 4; Principal and Surety, 2; Negligence, 12.

EXTENSION OF TIME. See Insurance, 10; Deeds and Conveyances, 14; Equity, 5, 6; Appeal and Error, 32.

FALSE ARREST. See Arrest, 3.

FEDERAL COURTS. See Removal of Causes, 1, 4, 8.

1. *Federal Courts—Federal Questions—United States Supreme Court—Conflict of Opinions.*—Where the decisions of the Federal courts inferior to the Supreme Court of the United States are in conflict as to matters involving Federal questions, in this case jurisdiction of the Federal courts in relation to the questions of the removal of causes from the State to the Federal court for diverse citizenship, and the United States Supreme Court has not passed upon the matter, the decisions of the State court will prevail. *Butler v. Armour*, 511.

FEDERAL DECISIONS. See Courts, 3.

FEDERAL EMPLOYERS' LIABILITY ACT. See Master and Servant, 8, 13.

FEDERAL QUESTIONS. See Federal Courts, 1.

FEE SIMPLE. See Wills, 7; Estates, 6, 7; Deeds and Conveyances, 19.

FELLOW SERVANTS. See Master and Servant, 11.

FEME COVERT. See Deeds and Conveyances, 2.

FERTILIZERS. See Bills and Notes, 12; Constitutional Law, 1.

1. *Fertilizers—Statutes — Actions — Defenses.*—Where the provisions of C. S., 4697, as to the State analysis of commercial fertilizers, etc., have not been complied with, the purchaser is not prevented from

FERTILIZERS—*Continued.*

setting up his defense that the commodity sold was unfit for fertilizing his crop, for which purpose it had been sold and bought. *Swift & Co. v. Aydlett*, 331.

2. *Fertilizers—Vendor and Purchaser—Breach of Implied Warranty—Damages—Evidence.*—Where a user of fertilizer has been buying that of a certain analysis for years past, and found it productive of potatoes on his land, he may show by parol evidence, in the manufacturer's action to recover on a note given for the purchase price, that at the time in question he had used the same kind of fertilizer he had theretofore bought from the same manufacturer on the same land under practically the same weather conditions of cultivation, and the potatoes so grown were too small and stringy to be of any value, and such evidence is not excluded by C. S., 4697. *Ibid.*

3. *Fertilizer—Vendor and Purchaser—Contracts—Evidence—Effect on Crop.*—The rule excluding evidence of the inferiority of fertilizers bought from the manufacturer and used in making the crop, unless the latter had had it analyzed by the State chemist, does not apply to evidence tending to show in this way that the fertilizer was valueless and not that which the manufacturer had contracted to sell. C. S., 4697. *Ibid.*

FILLING BLANKS. See Deeds and Conveyances, 15.

FINDINGS. See Injunction, 1; Judgments, 15, 16; Reference, 5, 6; Schools, 1; Appeal and Error, 23, 30; Instructions, 8.

FORCE. See Arrest, 5; Robbery, 1.

FORCIBLE TRESPASS.

1. *Forcible Trespass—Peaceful Entry Upon Lands—Abusive Language—Aider and Abettor.*—Where there is evidence that the defendant on trial for forcible trespass entered peacefully into the store of the prosecuting witness, and thereafter violently cursed him without provocation, and acted so as to reasonably intimidate the prosecutor or lead to a breach of the peace, the conduct of the defendant within the store is a forcible trespass sufficient to sustain the charge in the indictment, and an aider and abettor who entered with him and standing by, by his presence and conduct abetted him, is likewise liable for the offense. *S. v. Tyndall*, 559.

FORECLOSURE. See Mortgages, 1.

FOREIGN CORPORATIONS. See Courts, 4; Taxation, 8.

FRATERNAL ORDERS. See Benevolent Societies.

FRAUD. See Issues, 2; Corporations, 1, 2; Insurance, 16; Contracts, 5, 10, 21; Judgments, 2; Mortgages, 1; Bills and Notes, 7; Pleadings, 10.

1. *Fraud—Deceit—Allegations—Evidence.*—In defense to an action to recover of the defendant upon certain promissory notes upon the ground of fraud in their procurement, it is required that the defendant allege and prove that the representations were false and relied on to his injury, and procured by the plaintiff with knowledge thereof, or with reckless disregard of their truth or falsity, and made with fraudulent intent. *Finance Co. v. McGaskill*, 557.

FRAUD—*Continued.*

2. *Same — Contracts — Notes — Written Instruments.*—One who signs a promissory note is held to the terms of the written instrument when he can read and understand them, and relied on the misstatement of the other party because he was too busy with other matters to fully inform himself. *Ibid.*

3. *Fraud—In Factum—In Treaty.*—The established principles applicable to fraud in the treaty or negotiations of an instrument, and fraud in the *factum*, are, as applicable to the former, when under misrepresentations the person not under disability signs the identical instrument intended; when he signs under undue influence; when he may read and understand the instrument, but fails to do so; and as to the latter, where the papers are surreptitiously changed; or where there is false reading thereof upon request to a blind or illiterate person; where the signature is procured by fraud, imposition or artifice; or by trick, artifice or imposition other than false representations as to the contents; or want of identity between the instrument intended and the one signed. *Parker v. Thomas*, 798.

FRAUD IN THE FACTUM. See Bills and Notes, 23; Instructions, 15.

FRAUD IN THE TREATY. See Bills and Notes, 23.

FRAUDULENT REPRESENTATIONS. See Escape, 1.

FUGITIVES FROM JUSTICE. See Certiorari, 1.

FUNDS. See Garnishment, 1; Highways, 7; Banks and Banking, 27; Drainage Districts, 1.

GAME.

1. *Game—Ownership.*—The ownership of animals *ferœ naturœ*, or game, is in the people of the State at large, and not confined to that of the county in which they be found at any time. *S. v. Barkley*, 184.

2. *Same—Counties—License Tax—Constitutional Law—Discrimination.*—While the Legislature may enact valid laws for the protection of game and impose a license for hunting it to be paid to the game warden of the county, it may not, without some substantial basis, impose an increased license tax upon residents of other counties of the State than the tax imposed upon the residents of the county where the game is to be found, such being a discrimination inhibited by Art. I, sec. 7, of the State Constitution. *Ibid.*

GARNISHMENT.

1. *Garnishment—Parties—Motions—Distribution of Funds.*—Where several attachments have been levied, garnishee, in each succeeding case, should set up prior attachments and notify adverse claimants to come in by intervention and set up claims to property attached. *Hambley v. White*, 31.

GASOLINE. See Statutes, 9.

GENERAL LEGACIES. See Wills, 15.

GOOD FAITH. See Insurance, 16.

GOVERNMENT. See Schools, 7.

1. *Government—State Highway Commission—Roads and Highways—Condemnation—Damages—Rights and Remedies—Statutes.*—The owner of land cannot maintain an action in tort against the State Highway Commission, an unincorporated governmental agency, for damages caused to his land for its having been taken by the commission for highway purposes, and is confined for his remedy to the provisions of the special proceedings of 3 C. S., 3846(bb), 1716. *McKinney v. Highway Commission*, 670.

GRADE CROSSING. See Carriers, 3; Negligence, 4.

GRAND JURY. See Indictment, 1.

GUARANTOR. See Banks and Banking, 6.

GUARDIAN. See Constitutional Law, 2.

HABEAS CORPUS. See Appeal and Error, 17; Certiorari, 1.

1. *Habeas Corpus—Certiorari—Appeal and Error.*—An appeal will not lie in proceedings in *habeas corpus*, except in cases concerning the care and custody of children, and the procedure is by petition for a writ of *certiorari*. *S. v. Edwards*, 321.

2. *Habeas Corpus—Certiorari—Judgments—Courts—Void Judgments.*—The appellate court in *habeas corpus* proceedings may not act as one of error and review on appeal, and the question on review on defendant's behalf, is whether the judgment in question was void because unlawfully entered. *Ibid.*

3. *Habeas Corpus—Certiorari—Supreme Court—Record.*—Upon the application for a writ of *certiorari* to review a judgment entered in proceedings for *habeas corpus*, the case will be decided upon the records, and the Supreme Court will not consider any extraneous matters or circumstances. *Ibid.*

4. *Same—Judgments.*—Matters set forth in the writ for a *habeas corpus* as having occurred on a trial, will not be considered on appeal to the Supreme Court when contrary to a statement of fact set out in the judgment reviewed or case settled. *Ibid.*

5. *Habeas Corpus—Appeal and Error—Certiorari—Courts—Discretion.*—Where the care or custody of children are not involved an appeal to the Supreme Court will not lie from the judgment of the Superior Court in *habeas corpus* proceedings refusing to release one detained, as in this case, in a private hospital for mental diseases, the remedy being addressed on motion for a *certiorari* to the sound discretion of the appellate court. *In re Bellamy*, 672.

HARMLESS ERROR. See Appeal and Error, 8, 22; Instructions, 12; Banks and Banking, 23; Carriers, 7; Evidence, 19, 23.

HEARINGS. See Appeal and Error, 2; Banks and Banking, 20; Constitutional Law, 4.

HEARSAY EVIDENCE. See Criminal Law, 6.

HEIRS. See Wills, 9, 13; Drainage Districts, 2.

HIGHWAYS. See Robbery, 1; State Highway Commission, 1.

1. *Highways—Roads and Highways—Statutes—State Highway Commission—Discretionary Powers—County Seats.*—Where a map showing the existing highways of a state is used by the Legislature showing the existing roads connecting the county seats, and is made a part of the general statute establishing a state-wide plan thereof, and a state highway commission is also therein created with general authority to relocate, change or discontinue the highways as they appear upon the maps, with proviso that this discretionary power should not extend to county seats as appeared on the map, the discretionary power, by the intendment and express words of the statute, does not extend to discontinuing or relocating the roads connecting the county seats, as outlined upon the map, and thus change the road from its former location running to and from the courthouse square. *Newton v. Highway Commission*, 54.

2. *Same—Equity—Injunction.*—While the courts may not determine the location of highways in a state-wide plan thereof, enacted by statute giving control and authority to a state highway commission created for the purpose, equity will enjoin the relocation of a highway in a county when such power in the commission has been reserved from the discretionary power given it. *Ibid.*

3. *Highways—Roads and Highways—Statutes—Courts—State Highway Commission.*—The question of whether the relocation of a state highway at a county seat connecting the various county seats of the State, will cost more than to continue its location as the statute requires, is one for the Legislature, and neither for the courts nor for the State Highway Commission to determine. *Ibid.*

4. *Highways—Roads and Highways—Private Owners—Negligence—Highway Commissioners—Bridges—Statutes.—Held* in this action to recover damages for a personal injury against the highway commission of a county for negligence in failing to properly maintain a bridge across a public road, and against the owners of the land benefited by the road, that the evidence was insufficient to make the individual members of the commission liable, or the owners of the land, there being no evidence tending to show that such owners had so acted as to assume a liability, but that if any negligence had existed, it was attributable to the commissioners in their official capacity alone. C. S., 3795. *Holmes v. Upton*, 179.

5. *Roads and Highways — Laborers — Material — Statutes—Notice.*—The provisions of chapter 160, sec. 3, Public Laws of 1923, are prospective in effect, requiring among other things, that written notice of the sub-contractor's claim for labor and material used in the construction of a State highway, be furnished to the State Highway Commission, etc., and has no application where the labor done and the materials furnished were prior thereto, except as to suits pending. *State Prison v. Bonding Co.*, 391.

6. *Roads and Highways—Materialmen and Laborers—Contracts—Principal and Surety—State's Prison.*—Where a contractor with the State Highway Commission for the building of a State highway contracts among other things, to pay for the labor and material therein used, the surety on his bond becomes liable therefor when its bond is con-

HIGHWAYS—*Continued.*

ditioned upon the faithful performance by the contractor of his obligation under his contract, and that he "will well and truly pay all and every person furnishing materials or performing labor in or about the construction of the said roadway," and applies to convicts and materials furnished for the work by the State's prison. *Ibid.*

7. *Roads and Highways—Bonds—County Commissioners—Loan of Funds—County Treasurer—Contracts—Custody of Funds—Statutes.*—Where a county has issued bonds (C. S., 3634 *et seq.*), for the purpose of lending their proceeds to the State Highway Commission, to be used for the construction of certain highways within the county, and the county commissioners have such proceeds on hand, they may designate the banks in which they are to be deposited (C. S., 3634, 3655), and mandamus by the county treasurer will not lie for control of the funds as a part of the general county funds coming within her control, under the provisions of the statute. C. S., 1393. *Lewis, Treas., v. Comrs. of Wake*, 456.

8. *Same—Mandamus.*—Mandamus will not lie against public officials to compel the performance of an act unless the right is clear and unequivocal, or where its existence is in doubt under a statute relating to the subject. *Ibid.*

9. *Roads and Highways—Cartways—Ways of Necessity—Statutes—Evidence—Questions for Jury.*—Where there is evidence tending to show that the plaintiffs' lands are situated off of a public highway, with a cartway thereto of great inconvenience, and the board of road supervisors have ordered that a proposed way, more convenient and shorter in distance be laid off, and have held that such way is necessary, reasonable and just, and an appeal has been taken by the owners of the land from this order, and the owners of the lands condemned have further appealed to the Superior Court: *Held*, under the enabling amendments of chapter 135, Public Laws of 1921, and chapter 73, Public Laws, Extra Session of 1921, to 1 C. S., 3836 (now 3 C. S., 3836), that a new and improved passage way may be opened when the old one has become practically impassable or unreasonably inconvenient, an issue arises for the determination of the jury as to whether sufficient reasons exist for the proposed way, and a judgment of the lower court that the plaintiffs are not entitled to it as a matter of law, is reversible error. *Brown v. Mobley*, 470.

10. *Roads and Highways—Public Works—Materialmen—Laborers—Principal and Surety—Actions—Indictment—Criminal Law.*—A civil action for damages will not lie against special road supervisors of a county, either as an obligation of the county or against the supervisors individually, for failing to take the bond required for material furnishers or laborers under C. S., 2445, as amended by chapter 100, Public Laws of 1923, the remedy prescribed being by indictment of the latter in their individual capacity. *Hunter v. Allman*, 483.

11. *Roads and Highways—Cartways—Ways of Necessity—Deeds and Conveyances.*—Where a conveyance of lands provides for an outlet or way of necessity to a public road, to be designated, the grantor has the right of locating it, and upon his failure to do so, this right in proper instances may be exercised by the grantee, but the grantee

HIGHWAYS—*Continued.*

may not successfully claim that a private road belonging to a third person, and existent at the time, should be continued, there being nothing in the deed, covenant or contract that would uphold this view. Ways of convenience distinguished. *Mfg. Co. v. Hodgins*, 577.

12. *Same—Questions of Law—Issues—Questions for Jury.*—Where a deed to lands provides for a roadway, or way of necessity, over the grantor's land, the interpretation thereof is one of law, and presents no issue for the jury to determine. *Ibid.*

HOMICIDE. See Criminal Law, 1; Constitutional Law, 5.

1. *Homicide—Murder—Self-Defense—Evidence—Instructions.*—Where the evidence of the prisoner upon a trial for a homicide, tends to show that the deceased was under the influence of drink, and unprovoked, cursed him and threatened his life, and threateningly approached him to within a few feet, on the prisoner's own premises, with the axe upraised against him: *Held*, upon this evidence, the prisoner was entitled to an instruction, without special request therefor, that he was not only entitled to use sufficient force to repel force in order to save his own life or himself from great bodily harm, but to exceed such force if in the opinion of the jury it reasonably appeared to him that such excessive force was necessary. *S. v. Bost*, 1.

2. *Same—Burden of Proof.*—The burden is on the defendant tried for a homicide, relying on self-defense, to show it by the greater weight of the evidence. *Ibid.*

3. *Homicide—Murder—Instructions—Self-Defense—Justifiable Homicide—Appeal and Error.*—While under sufficient supporting evidence the prisoner on trial for murder is entitled to a charge of acquittal if he, in the opinion of the jury, killed the deceased without malice, while acting under the reasonable apprehension that such was necessary to protect him from great bodily harm, an unconnected portion of the charge will not be held for reversible error in failing to give him the full benefit of complete self-defense, if the charge in its related parts construed contextually sufficiently and unmistakably instructs the jury upon the correct application of the law. *S. v. Wooten*, 35.

4. *Homicide — Murder — Evidence — Witnesses — Physicians—Experts.*—Where the evidence is conflicting as to whether the defendant killed his wife on a dark night, in a storm, upon the mountains, with a blunt instrument, or whether the numerous wounds on her person and limbs taken collectively, were sufficient to cause death in the then physical or drunken condition of the deceased, and were caused by her slipping and falling upon a rock or other substance in the dark, relied upon by the defendant, it is competent on the defendant's appeal and under his exception for a physician, qualified as an expert, to testify as to whether the number of wounds under the circumstances could cause death, and whether a blunt instrument had been used in striking the deceased, under competent evidence as to the nature and character of the wounds found upon the body. *S. v. Messer*, 80.

5. *Homicide — Instructions — Evidence — Less Degree of Crime—Indictment.*—Upon the trial under an indictment for murder it is the duty of the trial judge, under supporting evidence, to declare and explain

HOMICIDE—*Continued.*

the law upon the less offense of manslaughter, with the burden of proof on defendant, and a statement of the contentions of the parties, etc., with a mere announcement of the principle is insufficient. C. S., 564, 4639. *S. v. Hardee*, 533.

6. *Same—Manslaughter—Evidence.*—Where the evidence tends to show that the prisoner and deceased, each armed with deadly weapons, entered willingly into the fight which caused the latter's death, it is sufficient to sustain a verdict of manslaughter, under proper instructions of the law from the court. *Ibid.*

7. *Same—Instructions.*—Where the instructions of the court to the jury of the law arising under the evidence, upon the principles of murder and manslaughter, construed as a whole, and not disjointedly, are correct and not misleading, prejudicial error will not be held on appeal. *Ibid.*

8. *Homicide—Spirituous Liquors — Intoxicating Liquors — Arrest—Statutes—Suspicion — Search Warrant — Manslaughter.*—Under the provisions of our statute, 3 C. S., 3411(f), an officer of the law is required to have a search warrant or have personal knowledge of the fact committed in his presence, to make an arrest of those who are transporting spirituous liquor in violation of the statute, and for him to fire upon a passing automobile with only an erroneous suspicion that the occupants thereof were thus unlawfully engaged, is without warrant of law, and the unintentional killing of one of those suspected as a result, is manslaughter at least, and a verdict thereof under the conflicting evidence will be sustained on appeal. *S. v. Simmons*, 692.

HUSBAND AND WIFE. See Tenants in Common, 2, 4; Descent and Distribution, 2; Trusts, 1; Wills, 16; Trespass, 1.

1. *Husband and Wife—Jus Accrescendi—Evidence—Questions for Jury.*—Where there is conflicting legal evidence as to whether or not the right of survivorship of the husband vested in him the title to lands held by him and his wife by entireties, an issue is raised for the determination of the jury. *Crocker v. Vann*, 423.

2. *Husband and Wife—Alienation of Wife's Affection—Malice.*—In order for a husband to recover damages for the alienation of his wife's affection, where no element of seduction or adultery exists, it is necessary for the plaintiff to prove malice in the sense of unjustifiable conduct of the defendant causing the injury in suit. *Rose v. Dean*, 556.

3. *Same—Evidence—Letters.*—A single intercepted letter written by the defendant in an action by the husband for damages for alienating his wife's affection, where immorality between them is not claimed, and malice is necessary to be shown, is insufficient, in the absence of other evidence tending to show unjustifiable conduct on the part of the defendant causing the injury in suit. *Ibid.*

HYPOTHETICAL QUESTIONS. See Constitutional Law, 6.

ICE. See Municipal Corporations, 1.

IDENTIFICATION. See Rape, 1; Deeds and Conveyances, 1; Criminal Law, 1.

IDENTITY. See Appeal and Error, 1; Rape, 4.

IMPEACHMENT. See Evidence, 14; Negligence, 14.

IMPLICATION. See Statutes, 2.

IMPLIED WARRANTY. See Bills and Notes, 13; Fertilizers, 2.

IMPROVEMENTS. See Municipal Corporations, 3, 5, 6, 15.

INADVERTENCE. See Judgments, 1.

INDEBTEDNESS. See Schools, 4.

INDEPENDENT CONTRACT. See Insurance, 12.

INDEPENDENT CONTRACTOR. See Contracts, 17; Election of Remedies, 1.

INDICTMENT. See Criminal Law, 3; Highways, 10; Homicide, 5; Robbery, 1.

1. *Indictment—County Courts—Appeal—Grand Jury.*—Where there is a conviction of a misdemeanor in a county court having jurisdiction under a sufficient indictment, it is not necessary for another indictment to be submitted to the grand jury in the Superior Court on appeal. *S. v. Pace*, 780.

INFANTS. See Negligence, 2, 11.

INFIRMITIES. See Bills and Notes, 1.

INHERITANCE TAX. See Taxation, 8.

INJUNCTION. See Attachment, 1; State Highway Commission, 1; Highways, 2; Municipal Corporations, 1; Benevolent Societies, 1, 2; Taxation, 6.

1. *Injunction—Appeal and Error—Evidence—Facts Found—Presumptions—Approval of Findings.*—Upon appeal where injunctive relief is sought, as in this case, there is a presumption in favor of the ruling of the lower court when supported by evidence, and while the Supreme Court is not bound by such ruling, it is approved upon the record in the instant case. *Ice Co. v. Plymouth*, 180.

INSOLVENCY. See Banks and Banking, 13, 22; Descent and Distribution, 4.

INSTRUCTIONS. See Robbery, 3; Homicide, 1, 3, 5, 7; Appeal and Error, 7, 9, 10, 14, 20, 21; Bills and Notes, 4; Principal and Surety, 4; Contracts, 10, 28; Criminal Law, 3; Negligence, 10, 11, 12, 13; Constitutional Law, 5; Evidence, 24; Master and Servant, 23.

1. *Instructions—Courts—Expression of Opinion—Statutes — Evidence — Questions and Answers—Appeal and Error.*—Where upon the trial of a capital felony the same witness has several times fully answered a question of the defendant's attorney, it is within the discretion of the trial judge, in order to expedite the trial, to relieve the witness of answering substantially the same question; and his statement before the jury that the witness had already fully answered is not an expression of his opinion upon the weight and credibility of the witness, inhibited by statute. *S. v. Mansell*, 20.

INSTRUCTIONS—*Continued.*

2. *Instructions—Evidence—Directing Verdict — Statutes — Expression of Opinion—Appeal and Error.*—Where the defendant is on trial for the unlawful sale of intoxicating liquor, and the only testimony is given by two witnesses as having bought it from him at different times, and the defendant's evidence is in contradiction of one of them, a charge by the court for the jury to return a verdict of guilty if they believed or found as true the testimony of the other witness (capable of only one meaning), is not an expression of the court's opinion upon the weight and credibility of the evidence, inhibited by C. S., 564. *S. v. Moore*, 209.

3. *Instructions—Appeal and Error.*—If construing an instruction of the jury contextually in its related parts it is sufficient to inform the jury correctly as to the principles of law arising upon the evidence in the case, it will not be held for reversible error because construed disjointedly it may be the subject of judicial criticism. *S. v. Lee*, 225.

4. *Instructions — Criminal Law — Evidence — Directing Verdict.*—Where from all the evidence both for the State and the defendant on a trial for a criminal offense, only the inference of guilt can be legally inferred, an instruction to the jury is proper to find the defendant guilty should they so find the facts to be beyond a reasonable doubt. *S. v. Strickland*, 253.

5. *Same — Assault — Statutes — Intent to Kill.*—Where the indictment charges an assault with a deadly weapon with intent to kill, etc. (C. S., 4213, 4214, 4215), and all the evidence both for the State and for the defendant tends to show that the defendant himself brought on the fight by aggression, and that the prosecuting witness had been injured by being struck by some hard metallic substance in the defendant's hand, which he did not see, causing his nose to be broken and other serious injuries: *Held*, an instruction directing a verdict of guilty of at least a simple assault is not erroneous. *Ibid.*

6. *Instructions—Appeal and Error—Criminal Action—Assault—"Serious Injury"—Prejudice.*—Where the defendant has been convicted of an assault inflicting serious injury, an instruction defining "serious injury," if prejudicial, will not be held as reversible error if from all the evidence it unmistakably appears that a serious injury had been inflicted on the prosecuting witness by the defendant. *Ibid.*

7. *Instructions—Appeal and Error—Insurance, Accident—Policy—Contract—Defenses.*—Where the insurer under an automobile accident policy defends under a stipulation in the policy contract excluding liability if the insured was not sane or sober at the time of the injury in suit, the judge is not required to charge, on defendant's appeal under our statute, upon the law of insanity, when the defendant has withdrawn its defense thereon. *Moore v. Ins. Co.*, 581.

8. *Instructions—Contracts, Written—Interpretation—Questions of Law—Jury—Findings—Evidence.*—Where the evidence is conflicting as to whether a written instrument fully expressed the agreement of the parties, or should be reformed in equity for mistake, or was subsequently modified by the parties, it is correct for the trial judge to construe the intentions of the parties as expressed in the written contract, hypothecated upon their findings as to the facts upon the questions involved. *Bryant v. Lumber Co.*, 608.

INSTRUCTIONS—*Continued.*

9. *Instructions—Interpretation—Instructions Construed as a Whole—Appeal and Error.*—Where the trial judge illustrates his meaning in an instruction to the jury with a hypothetical state of facts, it will not be held for error if he so informs the jury at the time, and tells them there was no evidence thereof, and men of intelligence would not reasonably have been misled thereby. *Dulin v. Henderson-Gilmer Co.*, 639.

10. *Instructions—Requests for Instructions—Damages—Appeal and Error.* An instruction of the court upon the measure of damages, received from a personal injury, will not be held for error when it is correct upon the general principles applicable in the absence of a request for special instructions, to make them more specific. *Ibid.*

11. *Instructions—Negligence—Automobiles—Appeal and Error—Rule of Prudent Man.*—In an action against the defendant for damages caused to plaintiff for the latter's negligently causing a collision between the defendant's auto-truck and the plaintiff's automobile, an exception to the failure of the court to charge upon the rule of the prudent man will not be sustained, when construing the charge as a whole, this instruction was substantially and clearly given. *DeLaney v. Henderson-Gilmer Co.*, 648.

12. *Instructions—Verdict—Appeal and Error—Harmless Error.*—Where there are several counts of the indictment, and the charge was correct upon those upon which a conviction had been had, the verdict cures error, if any, committed, in not giving the principles of law arising from the evidence upon the count upon which the appealing defendant was acquitted. C. S., 564. *S. v. Church*, 658.

13. *Instructions—Criminal Law—Burden of Proof—Charge Construed as a Whole.*—An instruction in a criminal case will not be held for prejudicial or reversible error for failing in one part of the charge to place the burden of proof on the State to show guilt beyond a reasonable doubt, when in the same connection, and by another portion of the charge, this requirement is clearly given. *S. v. Pierce*, 767.

14. *Instructions—Words and Phrases.*—The use of the words "proven by the testimony" for the words "warranted by the testimony," is not subject to just criticism by the defendant in a criminal case, when used in the charge by the judge to the jury in relation to the degree of proof required of the State to convict. *Ibid.*

15. *Instructions—Statutes—Fraud in the Factum—Appeal and Error—Requests for Instructions.*—Where there is evidence in a suit to set aside an instrument for fraud, tending to show the existence of the fraud both in the *factum* and in the treaty, a failure of the trial judge to charge the principles arising therefrom upon fraud in the *factum*, and to sign a judgment in accordance with the principles of fraud in the treaty, is reversible error under C. S., 564, though a special request therefor has not been tendered by the complaining party. *Parker v. Thomas*, 798.

INSURANCE. See Courts, 4; Statutes, 10; Evidence, 15; Instructions, 7; Master and Servant, 19.

1. *Insurance, Fire — Policy — Contracts—Inventory Clause — Substantial Compliance—Evidence.*—An inventory of a stock of general merchan-

INSURANCE—*Continued.*

dise containing the number of articles and cost of each class at a date made about one month before the fire, and testified to as being practically the same as on the date of the fire, is a substantial compliance with the inventory provision in the standard form of a fire insurance policy, and is competent as evidence upon the trial. C. S., 6347. *Mortt v. Ins. Co.*, 8.

2. *Insurance, Fire — Policies—Contracts—Unconditional Ownership—Assignment—Assent of Insurer.*—The clause in a fire insurance policy that the insured must be the unconditional owner of the property insured, and that an assignment of the policy to a purchaser will render the policy void if not assented to by the officials of the insurer, is valid and enforceable in favor of the company against the assured and his assignee. *Ibid.*

3. *Insurance, Fire—Unconditional Ownership—Assignment of Policy—Premium Entire and Single.*—Where the owner of a store and a stock of merchandise is insured at one premium rate, the merchandise to remain in the store during the term covered by the contract, a change of ownership of the merchandise, without the consent of the insurer, will avoid the obligation of the insurer, under an express condition relating thereto contained in the policy, under the principle that the premium is entire, and the obligation single, and each dependent on the other. *Ibid.*

4. *Same—Principal and Agent—Ratification.*—Where the owner of a building and merchandise therein has sold the merchandise, thus rendering the policy void, according to its terms, and thereafter the insurer, with knowledge has retained the unearned premiums after its agent had consented to the assignment of the policy to the purchaser of the merchandise, the insurer will be bound, under the terms of the policy, to the payment of damages to the assignee of the policy, the purchaser of the merchandise, caused by a fire thereafter occurring, under the principle of ratification. *Ibid.*

5. *Insurance—Service—Process—Statutes—Nonresident Defendant — Secretary of State—Special Appearance—Motions—Actions—Dismissal.*—In order to a valid service of summons upon a nonresident fire insurance company for loss by fire, upon the Secretary of State, under the provisions of C. S., 6414, it is necessary that the defendant by compliance with C. S., 6415, or the other relevant sections of our statutes. C. S., 6288, 6410, 6424, 6425, 6426, 6427, has submitted itself to the jurisdiction of our courts, or become subject thereto, and where it has only been made to appear that the policy was obtained from a foreign agency for placing insurance, that the nonresident defendant had no property or agency in this State, C. S., 1137, nor had sent adjusters herein for losses at any time, and had only thus accepted other policies of insurance in one or two isolated cases, it is not sufficient evidence to sustain the service of process, and upon the defendant's special appearance and motion, the action will be dismissed. *Timber Co. v. Ins. Co.*, 115.

6. *Insurance, Fire—Judgments—Contracts—"Unconditional Ownership"—Liens.*—Where the plaintiffs' grantee of lands has obtained judgment against a former claimant of title that he is entitled to the possession thereof subject to the improvements in a certain amount put thereon

INSURANCE—*Continued.*

by the claimants, with order that if not paid within a stated period the lands be sold and the proceeds applied to this payment, etc., and thereafter when the lands were subject thereto the plaintiffs have acquired the lands and insured the buildings thereon against fire in the defendant company, a clause in the policy avoiding the company's liability if the ownership be otherwise than sole and unconditional is not rendered void by the judgment above mentioned, and the plaintiffs may recover upon the policy for loss by fire occurring within the period covered by the policy. *Farrow v. Ins. Co.*, 148.

7. *Insurance, Fire—Policies—Contracts—Payment of Premium—Delivery—Intent.*—Where a policy of fire insurance is in the hands of the company's soliciting agent, before the insured has paid the premium thereon necessary for the policy to be enforced in case of loss by the insurer, as expressed upon its face, and a loss has been incurred which is covered by the policy, under conflicting evidence, the question as to whether the policy has been delivered to the soliciting agent of the company is largely one of intention of the insured, and the agent of the insurer who had agreed between themselves that the payment of the premium should be deferred. *Dawson v. Ins. Co.*, 312.

8. *Same—Evidence.*—Whether or not a fire insurance company has delivered its policy covering the loss in suit to its agent with the intent that it should be delivered to the insured contrary to an express condition appearing in the face of the policy that its validity depended upon the payment of the premium by the insured, may be shown by the words or acts of the insured indicating that the policy, in the hands of the agent at the time of the loss, was not beyond its legal control, and if the insured, the plaintiff in the action, establishes this fact to the contrary, he may recover damages for a loss occurring within the life of the policy. *Ibid.*

9. *Same—Delivery of Policy Upon Condition of Payment of Premium.*—A policy of fire insurance, issued in the statutory form, may by agreement between the insurer or its authorized agent and the insured be delivered upon the mutual intent, that it shall be valid only upon the subsequent payment of the premium at a fixed future date, and under such circumstances the policy will have no binding effect until this condition has been fulfilled. *Ibid.*

10. *Same—Principal and Agent—Agreement of Agent Extending Time to Pay Premium.*—Where the agent of a fire insurance company has personally agreed with the insured that the latter may pay the premium thereon within a certain fixed time, and the company itself is not a party thereto, and has not become bound thereby, and a loss has occurred within the life of the policy contract, the insurer, the principal, is not liable for the loss in suit. *Ibid.*

11. *Same—Cancellation of Policy by Insurer—Notice—Policy—Contracts.*—Where a fire insurance company has issued a policy, through its agent, upon condition that it may cancel its policy upon given previous notice to the insured, such notice has no application to a separate and independent agreement between the agent and the insured as to the payment of the premium, contrary to the terms of the policy, or requires the insurer to give such previous notice before canceling the policies at the agent's request.

INSURANCE—*Continued.*

12. *Same—Notice of Cancellation Given by Insurer's Agent Under an Independent Contract.*—The stipulation in the standard fire insurance policy, giving the insurer the right of cancellation upon notice, is for the protection of the insurer, and requires a strict compliance with its terms as to the notice given, but is not applicable when the notice is given by its agent, acting in behalf of the insured, under an independent agreement with the insured as to the payment of the premium contrary to the express stipulation of the policy, and by which agreement the company has never become bound. *Ibid.*

13. *Insurance, Fire—Policies—Contracts—Principal and Agent—Cancellation.*—Where the agent of the insurer enters into an independent contract with the insured to carry the premium for a certain period of time, and the insured has failed to pay accordingly, there is an implied authority given by the insured to the agent, to cancel the policy with insurer, under the provision in that respect of the standard or statutory form. *Ibid.*

14. *Insurance, Fire—Policies—Loss Payable Clause—Damages—Insurer's Liability.*—Where the insured has lost his right to recover for a loss by fire under his contract with the insurer, for failure to pay the premium, no right can be acquired by one claiming under the "loss payable clause" of the policy contract. *Ibid.*

15. *Insurance, Life—Policy—Assignee of Policy—Insurable Interest—Pleadings.*—Where a policy of life insurance is taken out payable to the estate of the insured, and has been issued to the insured, he may make a valid assignment thereof to another in good faith and in the absence of a fraudulent purpose, and the one to whom it has been assigned may, upon its maturity, maintain his action against the insurer without alleging or proving that he had an insurable interest in the policy. *McNeal v. Ins. Co.*, 450.

16. *Same—Fraud—Good Faith—Pleadings—Demurrer—Questions for Jury.* As to whether the insured has assigned a policy of life insurance payable to his estate to another in good faith, or as a cloak to conceal a wagering contract, is a question for the jury when the issue is presented upon demurrer. *Ibid.*

17. *Insurance, Life—Statutes—Medical Examination—Void Contracts.*—C. S., 6460, requiring a medical examination before the issuance of a life insurance policy, is a regulation imposed upon the insurer, and a failure to comply with this provision does not render the policy void as to the insured's rights thereunder. *Ibid.*

18. *Insurance, Accident—Policy—Contracts—Stipulations—Issues — Agreement of Parties—Automobiles.*—Where the defense to an action upon an automobile accident policy of insurance, among other things, provides that the insurer will not be liable if the insured was not sane or sober, and the defendant agrees that the insured was not insane at the time, failure of the judge to instruct the jury as to the former condition is not erroneous. *Moore v. Ins. Co.*, 580.

19. *Same—Evidence—Collective Facts—Opinions—Nonexpert Witnesses.*—Where the insurer's defense to an action upon an automobile accident policy, is nonliability under the express terms of a policy contract as to the insured not being sober at the time of the accident, it is compe-

INSURANCE—*Continued.*

tent for witnesses to the fact to testify in plaintiff's behalf that he was sober immediately before and after the occurrence, as a collective fact of ordinary observation. *Ibid.*

20. *Insurance, Accident—Automobiles—Stipulations in Policy—Waiver—Evidence.*—The stipulations in an accident insurance policy upon an automobile that written notice of the accident be given the insured within a certain time, or upon failure of the parties to agree as to the amount of damages, they will arbitrate, etc., are deemed waived by the insurer upon denial of liability. *Mattox v. Ins. Co.*, 612.

21. *Insurance, Fire—Contracts—Stipulations—Requirements as to Time of Bringing Action.*—Where the plaintiff has delayed bringing his action to recover loss by fire under a standard form of insurance, beyond the time therein specified, without evidence of a waiver of this provision of the policy, a judgment as of nonsuit thereon is properly granted. *Welch v. Ins. Co.*, 809.

INSURANCE, FIRE. See Insurance.

INTENT. See Wills, 1, 4, 6, 18; Statutes, 4; Instructions, 5; Insurance, 7; Deeds and Conveyance, 11.

INTEREST. See Judgments, 1, 13; Evidence, 2; Mechanics' Liens, 6; Insurance, 15.

INTERVENING CAUSE. See Negligence, 7.

INTERVENERS. See Executors and Administrators, 4.

INTOXICATING LIQUOR. See Arrest, 3; Homicide, 8; Master and Servant, 26.

1. *Intoxicating Liquor—Spirituous Liquor—Evidence—Nonsuit—Motions.* Evidence in this case tending to show that the defendant lived in a part of his filling station used as a residence, where was found a quantity of empty bottles smelling of whiskey, and that in the vicinity was a used roadway leading to several places where cartons with bottles of whiskey were concealed, etc.: *Held*, sufficient to deny defendant's motion as of nonsuit. 3 C. S., 3411 (b), (j). *S. v. Pierce*, 766.

2. *Intoxicating Liquor—Spirituous Liquor—Prima Facie Case—Evidence—Constructive Possession.*—A prima facie case of the unlawful sale of intoxicating liquors may be established by circumstances sufficient to show that the defendant had in his constructive possession large quantities of whiskey not on his premises, in the possession of others who held it for him. *Ibid.*

INVENTORY. See Insurance, 1.

"ISSUE." See Wills, 9.

ISSUES. See Contracts, 28; Reference, 4; Evidence, 17, 24; Pleadings, 2, 3; Municipal Corporations, 6, 10; Banks and Banking, 20; Estoppel, 1; Schools, 9, 12; Appeal and Error, 19, 20; Judgments, 20; Election of Remedies, 1; Rewards, 1; Highways, 12; Insurance, 18; Verdict, 1.

1. *Issues—Pleadings—Evidence—Verdict—Motion to Strike Out Answer—Appeal and Error.*—In an action by a manufacturer to recover upon a

ISSUES—*Continued.*

note given for the purchase price of fertilizers, the plaintiff must plead and show that the fertilizer furnished was in accordance with the contract of sale, and where this has not been done, it is error for the court to submit issues to the jury upon these questions and refuse to strike out answers to these issues upon defendant's motion. *Swift & Co. v. Aydlett*, 331.

2. *Issues—Verdict—Fraud—Appeal and Error.*—Where an issue of fraud in the procurement of a receipt is so interwoven under the evidence and the law of the case, with other issues submitted, that the answers of the other issues are influenced by it, the verdict on the issue of fraud will not be considered as immaterial. *Hoggard v. Brown*, 494.

3. *Issues—Evidence—Tenants in Common—Mortgages—Ouster—Limitation of Actions.*—Where the plaintiffs seek to be let into the possession of lands as tenants in common, and it appears without conflicting evidence that the defendants have been in peaceful possession of lands under a mortgage from their ancestor for more than thirty years after ouster, no issue of fact is raised for the determination of the jury. *Crews v. Crews*, 679.

JOINDER. See Actions, 2.

JOINT TENANCY. See Tenants in Common, 8.

JOINT TORT. See Removal of Causes, 4.

JUDGE. See Judgments, 7; Appeal and Error, 18, 20.

JUDGMENTS. See Bills and Notes, 6, 11; Removal of Causes, 7; Estates, 3; Insurance, 6; Railroads, 1; Criminal Law, 4; Estoppel, 1; Habeas Corpus, 2, 4; Appeal and Error, 23, 28; Election of Remedies, 1; Tenants in Common, 3, 4, 6, 7, 13; Certiorari, 1.

1. *Judgments—Interest—Principal and Surety—Appeal and Error—Inadvertence—Modification.*—Where under the terms of the indemnifying bond interest is not due until three months after defalcation of the principal, a judgment which allows interest from an earlier period, and is otherwise correct, will be accordingly modified and affirmed. *Loan Association v. Davis*, 109.

2. *Judgments—Pleadings—Default—Lands—Title—Fraud—Statutes—Admissions.*—Where the complaint in an action is to subject land fraudulently conveyed to the payment of a judgment, and it is alleged that pending the action the defendant had conveyed the *locus in quo* to the co-defendant in fraud and without consideration, who with knowledge of the fraud had accepted the conveyance, upon judgment by default for the want of an answer such allegations will be taken as true. *Gillam v. Cherry*, 195.

3. *Same—Default Final—Default and Inquiry—Damages—Appeal and Error.*—Where the plaintiff is entitled to judgment by default in an action involving the title to lands, and an inquiry as to the amount of damages is dependent upon this question alone, he is entitled to judgment by default final, and judgment by default and inquiry is erroneously entered. *Ibid.*

4. *Judgments — Consent — Mandamus — Schools—Attorney and Client.*—Where pending proceedings by the county board of education to compel

JUDGMENTS—*Continued.*

the county board of commissioners to provide funds for the purchase of certain lands for public school purposes, resisted upon the ground that certain statutory requirements had not been met by the plaintiffs in the action, both parties had agreed that the trial judge enter a consent order as to the purchase of the lands, the judgment accordingly entered is that of the agreement of the parties, not requiring the signature of the attorneys appearing thereon evidencing their consent. *Board of Education v. Comrs. of Sampson*, 274.

5. *Same—Vacated Only by Mutual Consent.*—Where, in accordance with the agreement of the parties, a judgment by consent has been entered by the court, it may not thereafter be vacated by the order of the court which had entered it of record, without the consent of both parties to the litigation. *Ibid.*

6. *Same — District — Committee—Parties—Statutes.*—In proceedings for mandamus by the county board of education to compel the county board of commissioners to provide funds for the purchase of lands selected by the plaintiffs for the establishment of a public school of a district within the county, the local school committee is not a necessary party, and its consent is not required under our statute to the validity of a judgment entered upon the consent of the county school board and the county commissioners. C. S., 5419, 5423. *Ibid.*

7. *Same—Procedure—Order of Subsequent Superior Court Judge Reinstating Consent Judgment—Appeal and Error.*—Where the Superior Court judge has entered a valid consent judgment in proceedings for mandamus, in an action by the county board of education against the county commissioners, in respect to the buying of lands to establish a public school within a district of the county, he may not thereafter vacate the judgment upon the erroneous ground that a valid consent had not been obtained, and retain the cause upon the docket, and the subsequent order of a judge regularly holding the courts of the district, reinstating the consent judgment, will be upheld on appeal. *Ibid.*

8. *Judgments—Estoppel—Parties.*—Estoppel by judgment does not apply as against the rights of those who were not made parties to the action. *Crocker v. Vann*, 423.

9. *Judgments—Estoppel—Claim and Delivery—Damages for Wrongful Detention—Actions.*—Where judgment is rendered against the defendant and the surety on his bond in claim and delivery, and therein no issue is submitted to the jury on the question of damages for the wrongful detention of the property, it does not estop the plaintiff from bringing an independent action to recover such damages. C. S., 610. *Moore v. Edwards*, 446.

10. *Judgments — Pleadings — Default — Meritorious Defense—Appeal and Error.*—An order of the lower court setting aside a judgment by default will be reversed in the Supreme Court, when it is not made to appear that the defendant has a meritorious defense. *Taylor v. Gentry*, 503.

11. *Judgments—Contracts—Vendor and Purchaser—Counterclaims.*—Where, in an action for a money demand for goods sold and delivered, brought in the court of a justice of the peace and tried on appeal in the

JUDGMENTS—*Continued.*

Superior Court, wherein defendant recovered upon his counterclaim set up by way of answer, a less sum than that ascertained to be due by him to plaintiff, the judgment awarding the plaintiff the difference so found is correct. *Ritchie v. Ritchie*, 538.

12. *Same—Courts—Appeal—Costs—Statutes.*—On an appeal from the court of a justice of the peace to the Superior Court, the trial in the Superior Court is *de novo*, and its costs in both courts are required by the statutes applicable to be taxed against the unsuccessful party, or, as in this case upon a judgment in plaintiff's favor for the difference between the amount of her demand over that allowed upon defendant's counterclaim set up by way of answer. C. S., 661, 1256. *Ibid.*

13. *Judgments—Contracts—Vendor and Purchaser—Interests—Verdict.*—Where the verdict of the jury has established the amount of the plaintiff's damages on defendant's breach of contract to accept and pay for upon delivery certain logs sold to him, to be delivered in reasonable quantities during a period of about ten months, the expiration of the delivery period expressed in the writing is the time for the payment for the logs, and it is not error for the judge to allow in the judgment rendered interest from that date, no specific date having been fixed by the verdict. *Mfg. Co. v. McQueen*, 189 N. C., 311, cited and distinguished. *Bryant v. Lumber Co.*, 608.

14. *Judgments Set Aside—Excusable Neglect—Meritorious Defense.*—A judgment by default for the want of an answer after the time therefor has elapsed as the statute requires, will not be set aside unless the defendant shows a meritorious defense, as well as excusable neglect. *Helderman v. Mills Co.*, 626.

15. *Same—Facts Found—Request of Parties.*—Where the defendant moves to set aside a judgment rendered against him for failure to answer, etc., for surprise, excusable neglect, etc., it is the duty of the judge to find the facts upon the evidence on which he bases his conclusions of law, at the request of the parties. *Ibid.*

16. *Same—Appeal and Error—Conclusions of Facts Found—Questions of Law—Review.*—Where the trial judge has found the facts upon supporting evidence from which he has drawn his conclusions of law, allowing defendant's motion to set aside a judgment for excusable neglect, the facts so found are conclusive on appeal, but the legal conclusions therefrom are reviewable thereon. *Ibid.*

17. *Judgments Set Aside—Attorney and Client—Neglect of Attorney—Excusable Neglect—Questions of Law—Appeal and Error.*—Where the defendant in an action has retained an attorney for his defense, of high character and reputation for diligence and faithfulness in the practice of his profession, with instructions to employ an attorney local to the litigation, and has fully relied on him to notify him of the steps necessary to be taken in his defense, and seeks to set aside a judgment by default therein entered against him for his failure to answer, the laches of the attorney, if any, nothing else appearing, is not attributable to the defendant and the order of the Superior Court setting aside the judgment for his excusable neglect when otherwise correct will be sustained on appeal. C. S., 600. *Ibid.*

JUDGMENTS—*Continued.*

18. *Same—Meritorious Defense—Judgment by Default Final—Questions for Jury.*—Where, upon defendant's motion to set aside a judgment by default final for excusable neglect, it appears of record on appeal to the Supreme Court that an issue of fact for the jury was raised, a meritorious defense is shown as a matter of law, and the judgment of the Superior Court allowing the defendant's motion will be sustained. *Ibid.*

19. *Judgments—Criminal Law—Continuance—Appeal and Error—Objections and Exceptions—Waiver.*—The defendant, on conviction of a criminal offense, has the right to have the judgment given at the term in which the conviction was had, so as to afford him the right to appeal to the Supreme Court, and it is error for the trial judge to continue the rendition of the judgment to some indefinite future time, under the defendant's exception, and when he has not waived this right. *S. v. Burgess*, 668.

20. *Judgments, Irregular—Motions in the Cause—Judgment Set Aside—Pleadings—Issues—Counterclaim.*—In plaintiff's action to recover damages of the defendant for failing to make a sufficient conveyance of his lands under a contract to do so, and the answer sets up a defense which from its expression the clerk erroneously regarded as a counterclaim, but which raised issues of fact for the jury, a judgment of the clerk denying relief to plaintiff is irregular, affording a remedy to plaintiff by motion in the cause. *Simons v. Masters*, 731.

21. *Judgments—Default—Mechanics' Lien—Judgment Set Aside—Statutes—Meritorious Defense.*—A judgment by default final in favor of material furnishers, etc., for a building erected on the lands of a nonresident owner, by service of summons by publication, may be set aside upon defendant's motion made in two days after he had notice of the pendency of the action, upon a finding of a meritorious defense. C. S., 492. *Burton v. Smith*, 191 N. C., 599, and other cases, cited as controlling. *Lumber Co. v. Rhyne*, 735.

JURISDICTION. See Master and Servant, 8; Removal of Causes, 7; Attachment, 1, 4, 5.

JURY. See Contracts, 22; Instructions, 8; Schools, 12; Evidence, 24.

JUS ACCRESCENDI. See Husband and Wife, 1; Tenants in Common, 9.

JUSTICES OF THE PEACE. See Summons, 1; Deeds and Conveyances, 18.

JUSTIFIABLE HOMICIDE. See Homicide, 3.

KNOWLEDGE. See Deeds and Conveyances, 4; Banks and Banking, 22, Master and Servant, 24.

LABOR. See Highways, 5, 6, 10; Municipal Corporations, 9; Principal and Surety, 5.

LACHES. See Appeal and Error, 32.

LANDS. See Judgments, 2; Evidence, 2; Deeds and Conveyances, 16, 17; Executors and Administrators, 1; Forcible Trespass, 1; Wills, 13; Taxation, 9.

LANDLORD AND TENANT.

1. *Landlord and Tenant—Leases—Contracts—Stipulations—Termination of Lease—Repairs.*—Where a swimming pool is leased for a year, under a written contract that the lease would terminate upon the pool becoming unfit for use: *Held*, a crack in the walls thereof by which the pool was drained of water, and repaired by the lessor at an inappreciable sum, is not sufficient to give the lessee the right to cancel the lease when repair was made under a parol agreement within a reasonable time. C. S., 2352. *Archibald v. Swaringen*, 756.

2. *Same—Reasonable Time.*—Where the controversy is made to depend upon whether the damage to the leased premises had been repaired by the lessor within a reasonable time, when the extent of the damage is insufficient to terminate the lease under its written terms, in this case the repair of walls of a dam to a swimming pool, evidence that three days had elapsed between the time the lessor and lessee had agreed upon the repairs necessary and the time the repairs were made, is sufficient to sustain an affirmative verdict that they were made in a reasonable time. *Ibid.*

LAWS. See Automobiles, 4; Reference, 8.

LEASES. See Landlord and Tenant, 1.

LEGISLATIVE INTENT. See Statutes, 1.

LETTERS. See Contracts, 4, 11.

LEVY. See Attachment, 1, 2, 5.

LEX LOCI FORUM. See Conflict of Laws, 1.

LIABILITY. See Banks and Banking, 2, 18; Insurance, 14; Bills and Notes, 20, 21, 22; Mechanics Liens, 6; Principal and Surety, 5.

LICENSE. See Constitutional Law, 2; Game, 2.

LIENS. See Insurance, 6; Bills and Notes, 9.

LIFE ESTATE. See Wills, 8; Estates, 9.

LIGHTS. See Carriers, 5.

LIMITATION. See Estates, 7.

LIMITATION OF ACTIONS. See Bills and Notes, 19; Issues, 3; Tenants in Common, 13, 14.

1. *Limitations of Actions—Evidence—Adverse Possession—Wills.*—Where the father has put his two sons in possession of his lands, allotting to each a definite portion, evidence in behalf of one that the land was a gift from their father, and that he had held his portion so allotted adversely for twenty years, is competent upon the question of his title as against a contrary disposition of the lands by will of the deceased father. *Lewis v. Lewis*, 267.

LIQUIDATION. See Banks and Banking, 31.

LOAN. See Highways, 7.

LOCATION. See Deeds and Conveyances, 17.

LOSS PAYABLE CLAUSE. See Insurance, 14.

MACHINERY ACT. See Taxation, 1.

MALICE. See Husband and Wife, 2.

MANDAMUS. See Judgments, 4; Highways, 8.

1. *Mandamus—Elections—Primaries—County Board of Elections.*—The plaintiff in proceedings for mandamus to compel the county board of elections to declare him the successful candidate of his party in a primary election, or that he is entitled to a second primary to select between himself and another candidate for the same office, must show the denial of a present, clear legal right, by the failure of such board to have done so. *Umstead v. Board of Elections*, 139.

2. *Same—Second Primary—State Board of Elections.*—Where a county is entitled to two representatives in the Legislature, and the highest two of the three who ran in the primary have received a majority of the votes cast, the one receiving the lowest number of votes for representative is not entitled to the ordering by the county board of elections of a second primary for the nomination in competition with the one who has received a majority of the votes cast in the first primary, and more than the plaintiff in mandamus has received therein, and the method directed by the State Board of Elections becomes immaterial under the circumstances. *Ibid.*

3. *Same—Written Notification.*—In order for a candidate for the party nomination for the Legislature to obtain a writ of mandamus against the county board of elections to compel the ordering of a second primary, he must show that his opponents receiving the larger number of votes have not received a majority of the votes cast for said nomination, and within five days after the result has been officially declared and he has been notified thereof, he must have filed with the county board of elections a written request that the second primary be called by it. C. S., 6045. *Ibid.*

MANSLAUGHTER. See Homicide, 6, 8.

MAPS. See Deeds and Conveyances, 1.

MARKETS. See Contracts, 6.

MARRIED WOMEN. See Deeds and Conveyances, 2.

MASTER AND SERVANT. See Negligence, 1, 2, 17, 19, 24, 25; Evidence, 16; Trespass, 2.

1. *Master and Servant—Employer and Employee—Negligence—Duty of Master.*—The master in the performance of his duty to furnish reasonably safe platforms for his servant to unload lumber, etc., from a railroad car, coming within the scope of the latter's duties, is held to the exercise of ordinary care in selecting material reasonably suitable and safe for its construction, and like care in its construction and inspection, without the power to delegate this responsibility to other servants so as to avoid its liability. *Fowler v. Conduit Co.*, 15.

2. *Same—Evidence—Nonsuit.*—Where there is evidence only that the master's vice-principal has instructed an eighteen-year-old employee in his absence to unload lumber with other employees from a railroad car in the manner in which the employees had experience, by means of a temporary unloading platform to be constructed of plank and

MASTER AND SERVANT—*Continued.*

sills, but only for transferring the timber (railroad sills) from the cars, without evidence of any defect in the material used in this platform, and the employee's injury is caused by his attempting to pile the lumber on this platform of considerable weight instead of transferring it, as was the invariable custom: *Held*, insufficient evidence as to the negligent failure of the master to furnish proper instrumentalities, and defendant's motion for judgment as of nonsuit should have been granted. *Ibid.*

3. *Master and Servant—Employer and Employee—Negligence—Pleadings—Evidence—Nonsuit.*—Where contributory negligence and assumption of risk are pleaded by the defendant in an employee's action to recover damages for an injury alleged to have been negligently inflicted, and the plaintiff's evidence, without contradiction, tends alone to sustain the defense, a motion for a judgment as of nonsuit should be allowed, and not otherwise. *Holeman v. Shipbuilding Co.*, 236.

4. *Same—Contract—Tort.*—The application of the doctrine of assumption of risk arises by contract between the master and servant, and that of contributory negligence sounds in tort. *Ibid.*

5. *Same—Proximate Cause.*—Where the application of principle of contributory negligence arises in the servant's action for damages against the master, direct and uncontradicted evidence of the plaintiff that he was driving defendant's truck loaded with lumber, and that some of the lumber fell upon the steering wheel after the accident occurred, will not avail the defendant on his motion to nonsuit, when there is evidence in plaintiff's behalf tending to show that the injury was proximately and previously caused by a defect in the steering machinery of the truck, which amounted to actionable negligence on the defendant's part. *Ibid.*

6. *Master and Servant—Employer and Employee—Assumption of Risk—Defective Implements—Automobiles—Trucks.*—The driver of defendant's truck while hauling lumber in the course of his employment, does not assume the risk of a worn and defective "radius rod," the condition of which proximately caused the injury for which damages in the action are sought. *Ibid.*

7. *Same—Duty of Master—Added Danger.*—A servant does not assume the risks incident or usual to the employment engaged in that were not so observable or obvious that a prudent man, under the circumstances, would not have continued with their use, or where the injury complained of was proximately caused by an added danger arising from the defendant's omission of the duty owed to him. *Ibid.*

8. *Employer and Employee—Master and Servant—Statutes—Federal Employers' Liability Act—Courts—Jurisdiction.*—The jurisdiction of the State and Federal courts for a personal injury to a railroad employee is concurrent under the Federal Employers' Liability Act, and an action brought in the State court is not removable by the defendant nonresident. *Inge v. R. R.*, 522.

9. *Same—Evidence—Procedure.*—Where an action is brought in the State court coming under the provisions of the Federal Employers' Liability Act, the Federal decisions are controlling, but the rules of practice and procedure are governed by the laws of the State court. *Ibid.*

MASTER AND SERVANT—*Continued.*

10. *Same—Common Law.*—The common-law rule denying recovery of a servant injured by the negligent act of a fellow-servant has no application under the Federal Employers' Liability Act. *Ibid.*

11. *Same—Contributory Negligence—Comparative Negligence—Damages—Statutes—Fellow-Servants.*—The rule that bars the injured employee from recovering in an action against his employer when the employee is guilty of contributory negligence, does not apply to cases coming under the provisions of the Federal Employers' Liability Act, and when contributory negligence is legally established, it only diminishes the damages, and no contributory negligence may be shown when the employer's act is in violation of a law enacted for the employee's protection. *Ibid.*

12. *Same—Nonsuit.*—A judgment as of nonsuit upon the evidence may not be granted under our statute when there is legal evidence of the employee's negligence in an action under the Federal Employers' Liability Act, upon the sole ground of the plaintiff's contributory negligence. C. S., 567. *Ibid.*

13. *Master and Servant—Employer and Employee—Federal Employers' Liability Act—Evidence—Nonsuit.*—Where the conductor in charge of a yard switch engine of a railroad company has at night left the engine with box car attached on the track in charge of the fireman and engineer, with instructions not to move the train, while in pursuance of his employment he went to defendant's outgoing train to get information as to track clearance, and got on the step of the engine, and as he stepped off between and on the parallel track at a public crossing, was ran upon and injured by the backing train he had left on a parallel track some distance away, approaching without warning of any kind: *Held*, under conflicting evidence, sufficient upon the issue of the defendant's actionable negligence, and the proximate cause of the injury to take the case to the jury, in an action brought under the Federal Employers' Liability Act. *Ibid.*

14. *Same—Contributory Negligence.*—Under the facts of this case: *Held*, the failure of the conductor to look back for his shifting train was not the sole proximate cause of the injury received, there being no circumstance to show that he could have anticipated that the employees thereon would disobey his orders not to move the train he had left, or that by so doing he would have discovered the danger, he having relied on the crew of the switch train to obey his orders. *Ibid.*

15. *Same.*—Where the conductor of a shifting train on a local yard has been injured by the negligent moving of the train contrary to his instructions, which proximately caused the injury in suit, a judgment as of nonsuit upon that issue is properly denied. *Ibid.*

16. *Same—Damages—Conflict of Laws.*—Under the provisions of the Federal Employers' Liability Act, a railroad company is liable in damages for a personal injury negligently inflicted by it on its employee, such sum as would presently represent, without interest added, the sum total of the diminished power in the future the difference between what he can now earn and what he would have been able to earn in the future had the physical injury not been inflicted on him, using the mortuary table given by statute, as evidence of his expectancy of life

MASTER AND SERVANT—*Continued.*

at his age, with other competent evidence as to his physical condition and ability to earn, together with the other elements of physical pain and mental suffering caused by the injury in suit. The difference between the State and Federal statutes distinguished by *Clarkson, J. Ibid.*

17. *Master and Servant—Employer and Employee—Negligence—Safe Place to Work—Helpers—Evidence—Nonsuit—Questions for Jury.*—It is the nondelegable duty of the master to reasonably furnish the necessary helpers for the servant to work in the course of his employment, as well as to furnish him a safe place to work and reasonably safe tools and appliances therefor, and where there is evidence that the servant was engaged for the defendant railroad company in repairing a refrigerator car by bolting a heavy oaken plank on to its end, requiring assistance to do so, and which was customarily furnished, and that he attempted to do the work alone, under the instructions of the defendant's vice-principal, it is sufficient to take the case to the jury upon the issue of defendant's actionable negligence, and to deny its motion as of nonsuit. *Barrett v. R. R.*, 728.

18. *Master and Servant—Employer and Employee—Safe Place to Work—Sufficient Help—Nondelegable Duty—Rule of Prudent Man.*—It is the nondelegable duty of the master to furnish to his employee doing work of a dangerous character in the course of the employment required of him, reasonably safe tools and appliances in general use for the doing of the particular work, and such help of others as is reasonably required therefor. *Clinard v. Electric Co.*, 736.

19. *Same—Insurer.*—The measure of liability of the master to his servant in failing to furnish him reasonably safe tools and appliances with which to perform a dangerous duty in the course of his employment, is that of an ordinarily prudent man, and not that of an insurer of the servant's safety under the existing conditions. *Ibid.*

20. *Master and Servant—Employer and Employee—Duty of Master—Reasonably Safe Tools and Appliances—Simple Tools.*—While the master is required to furnish the servant engaged in dangerous work reasonably safe simple tools, under the rule of the prudent man, the servant experienced in their use, is presumed to have knowledge as to whether their continued use is dangerous, and ordinarily the master is not required to inspect them to see that they have not become unsafe. *Ibid.*

21. *Same—Contributory Negligence.*—The failure of the master to furnish the servant reasonably safe tools and appliances to perform dangerous services, does not alone render the master liable for an injury to his servant, under the rule of the prudent man, but it is required that the injury was proximately caused by the failure of the master to perform his duty, or that the servant was not guilty of contributory negligence without which the injury in suit would not have occurred. *Ibid.*

22. *Master and Servant—Employer and Employee—Negligence—Safe Tools and Appliances—Evidence—Accessibility—Questions for Jury.*—Where the servant is injured while engaged in the course of his dangerous employment, and there is evidence in defendant's behalf that he

MASTER AND SERVANT—*Continued.*

had furnished all safe tools, appliances, etc., where the work was done and at the time of the injury in suit, it is for the jury to determine, under conflicting evidence, in proper instances, not only the fact of the tools, etc., having been furnished, but also, whether they were reasonably accessible to the servant at that time. *Ibid.*

23. *Master and Servant—Employer and Employee—Servant's Continuing to Work Under Instructions—Contributory Negligence—Negligence.*—An employee, engaged in dangerous work, anticipating danger from continuing to work with insufficient help, does not bar his right of recovery for a resulting injury, if the immediate injury was not in his contemplation, and he continued under his employer's instruction, with the belief that with the assistance furnished, he could overcome the danger of doing so. *Ibid.*

24. *Master and Servant—Employer and Employee—Dangerous Work—Tools and Appliances—Sufficient Help—Implied Knowledge.—Held*, under the facts of this case, the unloading of a steel tank two feet in diameter and eight feet long, weighing 530 pounds, with projecting rivets in it, from a truck to be carried down a stairway into a cellar where it was to be connected to a water system in a public school building, as a matter of common knowledge requires for the purpose rope, wire, or like appliances, and sufficient help, and which should have been anticipated by the master. *Ibid.*

25. *Master and Servant—Employer and Employee—Principal and Agent—Negligence—Scope of Employment.*—The test of the liability of the master for the negligent act of the servant causing damages to another, under the implied scope of the agent's authority in such matters, primarily depends upon whether the act complained of falls within the servant's obligation of service, or whether the servant was acting solely for his own purpose unconnected with his master's service. *Grier v. Grier*, 760.

26. *Same—Automobiles—Dealers—Intoxicating Liquors.*—Where the servant becomes drunk when driving an automobile for the business of his master, when the latter was unaware of the fact that his servant was addicted to drink, and had no reason to anticipate it on the occasion complained of, the mere fact that he permitted his servant to keep a car in his possession, as the nature of the business appeared to him to require, does not render him liable for an injury inflicted on another by his servant when under the influence of drink, upon an occasion on which the servant, without the knowledge of his master, took the car entirely for his own purpose or pleasure, and which the master had not expressly or impliedly authorized. *Ibid.*

27. *Same—Sales Agents.*—Where a dealer in automobiles designates from time to time automobiles to be used by his salesman for demonstration purposes alone, permitting him to keep the car at his home, and the servant takes the car out on Sunday for his own purposes, and while intoxicated runs upon and injures another person, and there is no evidence that the owner knew or was reasonably aware that the salesman drank intoxicating liquor, or would so use the car: *Held*, the owner is not liable for the damages thus caused, the same not being within the scope of the servant's duties, or the purposes of his employment. *Ibid.*

MATERIALMEN. See Contracts, 18; Highways, 5, 6, 10; Mechanics' Liens, 1; Municipal Corporations, 9; Principal and Surety, 5.

MATURITY. See Mortgages, 4.

MEASURE OF DAMAGES. See Negligence, 11; Vendor and Purchaser, 1.

MECHANICS' LIENS. See Judgments, 21.

1. *Mechanics' Liens—Principal and Agent—Materialmen.*—Where one has furnished the owner, at the request of the contractor, materials to be used in his building, and by the terms of the written contract, the contractor is the agent of the owner for that purpose, the one so furnishing the material may acquire and enforce his lien upon the building, under the provisions of C. S., 2433, 2469, 2470. *Lumber Co. v. Motor Co.*, 378.

2. *Mechanics' Liens—Liens—Municipal Corporations—Cities and Towns—Pro Rata Distribution of Penalty of Bond—Rights of Surety—Contracts.*—Where a municipal corporation has contracted for the erection of a public school building, and has on hand under the terms of the contract, a fifteen per cent reserve of its cost after making the monthly payments to the contractor, specified by the contract and the surety on the bond given in accordance with C. S., 2445, construed with the building contract, provides that the surety will be subrogated to the rights of the principal in the event of the contractor's default: *Held*, the surety company is entitled to the money thus reserved as against the laborers and material furnishers whose claims remain unpaid in full or in part, after the pro rata distribution of the money to the extent of the penalty of the bond which the surety has paid into the court under the statutory provision. *Mfg. Co. v. Blaylock*, 407.

3. *Same—Equity—Subrogation—Contracts.*—Laborers and material furnishers can acquire no liens on a municipal school building, and no right of equitable subrogation arises under the payment of the penalty fixed by the bond for distribution among them, but the surety may require, as against them, the payment to them by the municipality of the money still owing to the contractor, and in its hands, according to the contract of suretyship by which they became bound, upon paying the penalty of the bond into court under the provisions of the statute, C. S., 2445, amended by the Public Laws of 1923, ch. 100. *Ibid.*

4. *Mechanics' Liens—Municipal Corporations—Cities and Towns—Schools—Principal and Surety—Contracts—Interpretation.*—To determine the liability of the surety upon its bond given to a municipality for the contractor's performance of his contract to erect a public school building, the contract and the bond for which it is given must be construed together to effectuate its intent and purpose. *Ibid.*

5. *Mechanics' Liens—Municipal Corporations—Cities and Towns—Principal and Surety—Statutes—Bonds.*—Laborers and material furnishers can acquire no liens upon a public school building erected by a municipal corporation, and the contractor's bond, given under the provisions of the statute, C. S., 2445, ch. 100, Public Laws of 1923, is given for their benefit in lieu of the right to acquire a lien thereon. *Ibid.*

MECHANICS' LIENS—*Continued.*

6. *Mechanics' Liens—Cities and Towns—Municipal Corporations—Principal and Surety—Extent of Surety's Liability—Interest.*—The surety on the contractor's bond for the erection of a public building, is only liable for the amount of the penalty of the bond, and upon notification of the contractor's default or demand of payment by special contract, this amount so fixed may inure to the benefit of the surety, though the amount of the penalty may be inadequate to pay the claims of laborers and material furnishers for the building. *Ibid.*

7. *Mechanics' Liens—Municipal Corporations—Cities and Towns—Surety Bonds—Statutes.*—Where a surety company has executed a bond for a contractor to erect a municipal building under the provisions of C. S., 2445, before the amendment by ch. 100, Public Laws of 1923, conditioned among other things for the general contractor to pay for all labor done and material and supplies furnished for the work: *Held*, a subcontractor's thirty-day note given for materials furnished and actually used in the building is not a waiver by plaintiffs, who furnished the material, and falls within the liability assumed by the surety. *Moore v. Material Co.*, 418.

MEETINGS. See Banks and Banking, 8, 10, 29.

MERITORIOUS DEFENSE. See Judgments, 10, 14, 18, 21.

MILITARY. See Courts, 1.

MISJOINDER. See Actions, 3, 5; Removal of Causes, 8.

MISTAKES. See Contracts, 1, 5; Equity, 1.

MODIFICATION. See Judgments, 1.

MONEY. See Deeds and Conveyances, 2.

MORTGAGES. See Deeds and Conveyances, 2, 7; Purchase Money, 1; Issues, 3; Bills and Notes, 9, 19, 23; Descent and Distribution, 1; Tenants in Common, 14.

1. *Mortgages—Deeds and Conveyances—Foreclosure Sales—Advertisement—Description—Warranty—Fraud.*—Where the mortgagee or trustee has in good faith advertised the property foreclosed inaccurately as a certain number of feet frontage along a city street, in the absence of fraud or wilful misrepresentation, etc., the purchaser may not offset the purchase price by the value of a shortage, in the absence of a warranty by deed of the quantity of land sold, and who has had equal opportunity with the seller under the power in the instrument of having ascertained the exact frontage of the *locus in quo*. *Buckman v. Bragaw*, 152.

2. *Same—Caveat Emptor.*—The doctrine of caveat emptor applies to the sale of lands under foreclosure of a deed of trust. *Ibid.*

3. *Mortgages—Notes in Sets—Acceleration of Payment.*—A mortgage for the balance of the purchase money due by the mortgagor of lands, securing several notes maturing in different periods, may by its terms accelerate the maturity of the sum total of the indebtedness by expressly providing that should one of the notes or interest thereon not be paid at its maturity, then all the indebtedness should become due and payable. *Raper v. Coleman*, 232.

MORTGAGES—*Continued.*

4. *Same—Sales—Maturity.*—Where by express provision in a mortgage the power of sale is given when one in a series of notes it secures and interest thereon should remain unpaid after maturity, the exercise of the power of sale need not await the maturity of all the notes in the series, but may be exercised when a note of earlier maturity or interest thereon remains unpaid under its terms. *Ibid.*

5. *Mortgages — Title — Possession — Accounting — Rents and Profits.*—A mortgage of lands conveys to the mortgagee the legal title subject to the mortgagor's equity of redemption, giving the former the right of entry at any time, either before or after the time of payment due, requiring of him an accounting for the rents and profits for the duration of such possession, unless the writing itself is expressed to the contrary, and a provision in the instrument giving the mortgagee the right of immediate possession adds nothing to its character as a mortgage. *Crews v. Crews*, 679.

6. *Same—Mortgagee in Possession—Accounting—Statute of Limitations.*—Where, in accordance with the agreement expressed in the instrument, the mortgagee enters at once into possession of the lands, the mortgagor's right for an accounting arises when the bond the instrument secures has matured and remains unpaid; and his right of action and that of those claiming under him accrue then, and the mortgagor's right of action is barred by a continued peaceful possession by the mortgagee for ten years therefrom. C. S., 437(4). C. S., 432, does not apply. *Ibid.*

7. *Same—Adverse Possession.*—It is not required that the possession of the mortgagee be adverse in order to bar the mortgagor's action in ten years, under the provisions of C. S., 437(4). *Ibid.*

MOTIONS. See Garnishment, 1; Evidence, 11; Insurance, 5; Appeal and Error, 11; Issues, 1; Summons, 1; Judgments, 20; Intoxicating Liquor, 1.

MOTIVE. See Evidence, 22.

MUNICIPAL CORPORATIONS. See Constitutional Law, 2; Schools, 6; Mechanics' Liens, 2, 4, 5, 6, 7; Statutes, 8.

1. *Municipal Corporations—Ice Factory—Public Utilities—Taxation—Injunction—Ultra Vires Acts.*—A corporation engaged in the manufacture of ice in a different locality from a town manufacturing ice, and which is not a taxpayer thereof, may not enjoin the town from manufacturing the product on the ground that the act was *ultra vires*, and was the unlawful taking of the money of the taxpayers for a private business enterprise, especially when it is made to appear that the profits supplemented the money necessary to maintain a municipal utility operated under the same municipal management. *Ice Co. v. Plymouth*, 180.

2. *Same — Independent Sale to Citizen — Principal and Agent—Competition.*—An injunction will not issue to stop an incorporated city or town from manufacturing ice on the ground that the plaintiff is a corporation elsewhere existing in the State, and that the defendant, exempt from taxation, was selling ice to other than its own inhabitants in competition with the plaintiff, when it is made to appear that the defendant town was only selling its manufactured product to

MUNICIPAL CORPORATIONS *Continued.*

one of its citizens at the price available to all dealers therein, who personally was a competitor of the plaintiff, and not as an agent of the municipality. *Ibid.*

3. *Municipal Corporations — Street Improvements — Assessments—Taxation.*—An assessment by a city upon owners of property along and adjoining a street to be improved, is laid with reference to the benefits the owners will receive from the improvement to be made, and differs therein from the levy of a municipal tax for general purposes. *R. R. v. Ahoskie*, 258.

4. *Same—Statutes.*—The power of a city to lay an assessment upon the lands of owners along or adjoining a street to be improved, is derived from the statutes applicable. *Ibid.*

5. *Municipal Corporations—Assessments—Street Improvements—Statutes.* Under our statute the improvement of a street by a city for which an assessment may be made upon adjoining owners of land, includes the grading, paving, repaving, macadamizing and remacadamizing thereof. C. S., 2703. *Ibid.*

6. *Municipal Corporations—Cities and Towns—Street Improvements—Assessments—Statutes—Actions—Evidence—Issues.* — Under the provisions of our statute, it is necessary that there be an existing street in order for a valid assessment for improvements to be laid on the property of abutting owners, and this may be made an issue in the proceedings of the city commissioners to levy an assessment under our statute for improvements thereon, and the adjoining owner may introduce his evidence to show to the contrary. C. S., 2714. *Ibid.*

7. *Municipal Corporations—Constitutional Law—Ordinances—Mandamus.* Mandamus will lie to compel a municipal corporation to issue a license for a lawful business, in this case the erection and maintenance of a gasoline filling station within the corporate limits, unlawfully refused under an invalid municipal ordinance. *Bizzell v. Goldsboro*, 349.

8. *Municipal Corporations—Cities and Towns—Ordinances—Constitutional Law—Zoning Districts—Statutes.*—Under the provisions of the Zoning Statute, 3 C. S., 2776(s), (Laws of 1923, ch. 250, sec. 2), the regulations prescribed shall be uniform for each class or kind of building throughout each district, and the regulations of one district may differ from those of the others, and can have no application to the question of the rights of the governmental body of the city refusing to issue a permit for a gasoline filling station, in denial of the right of an applicant for such license under an invalid ordinance. *Bizzell v. Goldsboro*, 364.

9. *Municipal Corporations — Cities and Towns — Public Buildings—Contracts—Principal and Surety—Materialmen—Laborers—Subrogation—Equity.*—Where a bank has loaned money to a contractor who has defaulted in his payment to material furnishers and laborers on a public building, without taking assignments of their claims or directly for their payment, it cannot acquire a right of action against the surety on the contractor's bond or claim thereunder, even to the extent some of the money so loaned may have been paid to them by the contractor. *Bank v. Clark*, 403.

MUNICIPAL CORPORATIONS—*Continued.*

10. *Municipal Corporations—Cities and Towns—Condemnation—Issues—Damages—Nominal Damages—Appeal and Error—Correcting Verdict.* Where the jury have answered an issue as to the mere act of trespass against a town for the taking of plaintiff's land for a public use, in a substantial sum, and have also answered a different issue finding the damages for the permanent taking of his land, the latter issue will stand on appeal reducing the former issue to a nominal sum. *Batts v. Cary and Cary v. Batts*, 431.

11. *Municipal Corporations—Cities and Towns—Streets and Sidewalks—Reasonably Safe Condition.*—A municipality is held to the exercise of due care to keep its streets and sidewalks in a reasonably safe condition, and on failure thereof they are liable to one who receives an injury thereby proximately caused. *Tinsley v. Winston-Salem*, 597.

12. *Same—Negligence—Evidence—Nonsuit.*—Where a city has dug ditches for drainage or sewer pipes in the street and sidewalk in front of the residence of the citizen, and has the open ditches in the streets safeguarded at night, but not the one across the sidewalk, and the plaintiff has fallen into the latter during the night to her injury with evidence that the opening could not have been seen except with difficulty, because a light signal had not been placed there, and the shadow of a tree was cast upon the place by a small street light: *Held*, the absence of the guard and signal light under the circumstances was evidence of the city's actionable negligence, and its motion for judgment as of nonsuit should not have been allowed. *Ibid.*

13. *Same—Contributory Negligence.*—Where there is evidence tending to show that the plaintiff in her action for damages against a city was injured by the defendant's negligence in leaving an unguarded open ditch across its sidewalk at night, the fact that she was aware of these conditions and could have avoided them by day is not sufficient for the granting of a nonsuit upon the evidence, the conditions existing at night being different from those of the day when she could have more readily seen her danger. *Ibid.*

14. *Same—Evidence—Inference in Plaintiff's Favor.*—Where there is conflicting evidence upon a material issue susceptible of different inferences in the plaintiff's favor, defendant's motion as of nonsuit should be denied. *Ibid.*

15. *Municipal Corporations — Cities and Towns — Street Improvements—Statutes — Assessments — Petition of Property Owners.*—Where the abutting owners along a street of a city proposed to be widened by a municipality are to pay more than 50 per cent of its costs, the petition required by the statute to be filed with the municipality must show that it was signed by a majority of the owners along the street, including those who have a beneficial interest and each tenant in common when any of the lots are held in common, and the majority of such persons must own a majority of the frontage of the lots along the street. Chapter 107, Public Laws, extra session, 1924, amending chapter 220, Public Laws of 1923. 3 C. S., 2792(a), (b); C. S., 2707. *Winston-Salem v. Coble*, 776.

MURDER. See Homicide, 1, 3, 4.

NEGLIGENCE. See Carriers, 1, 2, 4, 5, 6; Master and Servant, 1, 3, 17, 22, 23, 25; Arrest, 1; Highways, 4; Banks and Banking, 16; Trespass, 2; Damages, 1, 2; Automobiles, 1; Evidence, 8, 24; Judgments, 17; Railroads, 4; Municipal Corporations, 12.

1. *Negligence—Master and Servant—Employer and Employee—Safe Place to Work—Safe Instrumentalities.*—The master is not liable in damages to its servant for his failure to furnish the latter reasonably safe instrumentalities to perform his duties within the scope of his employment, in the absence of actual or constructive notice of the defect; or unless through its vice-principal, it has negligently instructed the servant to do the work under an assurance of safety, or where the negligence complained of is not the proximate cause of the injury alleged. *Fowler v. Conduit Co.*, 14.

2. *Negligence—Master and Servant—Employer and Employee—Infants—Courts—Questions for Jury.*—It will not be held as a matter of law under the facts of this case, that an eighteen-year-old lad, of experience in such matters could not be considered capable of constructing a temporary platform for the unloading of lumber or sills from a railroad car. *Ibid.*

3. *Negligence—Automobile Passenger.*—The negligence of the driver of an automobile is not attributable to a mere passenger who is not engaged with him in a common enterprise, and who has no control over the operation of the automobile. *Earwood v. R. R.*, 27.

4. *Same—Carriers—Railroads — Grade Crossings — Evidence—Proximate Cause—Questions for Jury.*—When a passenger in an automobile is killed in a collision at a public highway grade crossing of a railroad track in a town, and the negligence of the driver of the automobile is not attributable to him, and there is evidence of negligence on the part of the driver and on the part of the engineer and crew on the railroad company's train, in an action against the railroad company for the wrongful death of the passenger, the issue of the defendant's negligence is for the jury upon the question of the proximate cause. *Ibid.*

5. *Negligence—Concurrent Negligence—Proximate Cause.*—In an action against a railroad company for damages for the negligent killing of the plaintiff's intestate, while the defendant is not liable if the independent negligence of another is the sole, efficient, and proximate cause, the defendant is liable if its negligence contributed as the proximate cause to the injury complained of. *Ibid.*

6. *Negligence—Torts—Damages — Proximate Cause.*—The rule awarding damages against a wrongdoer to the person thereby injured, is such amount as will compensate him for the injury, extending not alone to injuries which are directly and immediately caused by the wrongful act, but also to such consequential injuries, as according to common experience of men are likely to result from such act. *Lane v. R. R.*, 287.

7. *Same—Intervening Acts.*—A *tort-feasor* is not relieved from liability from his negligent act when damages for a personal injury results therefrom as the natural and probable consequence by the intervening

NEGLIGENCE—*Continued.*

act or omission of a third party, whether wrongful in itself or not, which is made necessary or proper because of the act of such *tort-feasor. Ibid.*

8. *Same—Physicians and Surgeons—Minimizing Damages—Ordinary Care.* Where a person is injured as the proximate cause of the negligent act of another, it is his duty where the injury reasonably appears to require it, to minimize his damages in the exercise of ordinary care or prudence under the circumstances, to secure the attendance of a physician or surgeon, as the case may be, and when the party injured has used such care as required of him the *tort-feasor* is responsible for the results whether favorable to him or otherwise. *Ibid.*

9. *Negligence—Evidence—Attractive Nuisance.*—In the absence of evidence tending to show that a child was not injured at the place of an "attractive nuisance" alleged to have caused the injury in suit, it was insufficient to be submitted to the jury. *Jordan v. R. R.*, 375.

10. *Negligence—Automobiles — Collisions — Instructions—Evidence—Questions for Jury—Appeal and Error.*—Where there is allegation and evidence tending to show that the plaintiff was injured by the negligence of the defendant's driver of its auto-passenger bus upon a public highway, negligently driving at a high speed upon an auto-bus of another line, causing the driver of the other bus to back his bus off the road and strike the plaintiff, and thus cause the injury in suit, it is reversible error to the plaintiff's prejudice for the trial judge, in his instructions to the jury, to make the question of negligence of the first line to depend solely upon whether there was an actual collision of the busses. *Shipp v. Stage Lines*, 475.

11. *Negligence—Personal Injuries—Infants—Measure of Damages—Parent and Child—Earnings of Child — Appeal and Error — Instructions.*—While one entitled to damages negligently caused by the act of another may recover the present cash value of such sum as will compensate him past, present and prospective, this rule must be limited, when the plaintiff so receiving the injuries is an unemancipated infant, supported by his father, his next friend in the action, to such compensation as will continue after he has reached his majority, the father being entitled to the infant's earnings, etc., before that time, and an instruction that fails to observe this limitation as to the amount of recovery is reversible error. *Ibid.*

12. *Negligence—Damages—Evidence — Expert Opinions—Instructions.*—In an action to recover damages for injury to plaintiff's teeth alleged to have been caused by the negligence of the defendant, it is competent for a dentist who had personally examined her after the injury complained of, and who was attending her in his professional capacity, and who had qualified as an expert witness in such matters, to testify as to the present and future effect the injury would have upon the plaintiff at her age, the change in her facial expression made thereby, etc., such falling within the experience of his profession, the damages recoverable being prospective as well as present. *Dulin v. Henderson-Gilmer Co.*, 638.

13. *Negligence—Instructions—Rule of Prudent Man—Appeal and Error.*—Where the rule of the prudent man is applicable under the allegations

NEGLIGENCE—*Continued.*

and evidence in a personal injury case, the failure to fully charge upon this phase of the controversy is not reversible error when the judge has generally charged it elsewhere in his instructions, and when thus considered, the jury could not reasonably have been misled. *Ibid.*

14. *Negligence—Automobiles—Evidence — Impeachment — Contradiction — Substantive Evidence.*—Where the plaintiff in his action to recover damages against the defendant for negligently causing a collision between its car and that of the plaintiff, on cross-examination has admitted that his car at the time was being driven by his daughter, under sixteen years of age, knowingly in violation of the traffic law, testimony in answer to this evidence, that the daughter was an expert and careful driver is competent, though not to be considered as substantive evidence. *DeLaney v. Henderson-Gilmer Co.*, 647.

15. *Negligence—Rule of Prudent Man—Proximate Cause.*—It is not required under the rule of the prudent man that the defendant should have foreseen that a particular character of injury would result from his failure to observe the rule, and it is sufficient to sustain the action if an injury would likely result to some one from his failure to observe the rule, and that from his negligence the injury in suit was proximately caused to the plaintiff. *Ibid.*

16. *Same—Contributory Negligence—Traffic Laws—Statutes—Prima Facie Case—Proximate Cause—Evidence—Questions for Jury.*—Where there is evidence that plaintiff's damages were caused by the defendant's negligence in a collision of the latter's auto-truck with the former's automobile, the fact that the plaintiff's car was being driven at the time by his daughter, under sixteen years of age, knowingly in violation of the traffic law, raises only a prima facie case of contributory negligence, and will bar his right of recovery only if it is the proximate cause of the injury in suit. *Ibid.*

17. *Negligence—Railroads—Master and Servant—Employer and Employee—Evidence—Nonsuit—Rule of Prudent Man—Questions for Jury.*—Evidence that the flagman on defendant railroad company's train saw the deceased at work in the course of his employment under a disconnected box-car on the defendant's track, and about fifteen minutes thereafter signalled the engineer on the train to couple it therewith which resulted in death, is sufficient to take the case to the jury under the rule of the prudent man. *Ritchie v. R. R.*, 666.

18. *Same—Contributory Negligence—Damages—Statutes.*—Where there is evidence that the defendant railroad company negligently coupled a box-car under which the deceased was at work to its train, causing his death, the fact that the deceased was guilty of contributory negligence in failing to place the customary signals where he was at work, does not entitle the defendant to a judgment as of nonsuit, and the amount of the verdict will be reduced under the doctrine of comparative negligence. C. S., 567. *Ibid.*

19. *Negligence—Master and Servant—Evidence—Safe Place to Work—Dangerous Employment—Blasting.*—Evidence that the foreman of the defendant failed to perform his duty to reasonably discover that all the dynamite loaded in drills for blasting had exploded, in the absence of

NEGLIGENCE—*Continued.*

the employee, and that plaintiff was injured by one of them unexpectedly exploding under circumstances not reasonably to have been anticipated by him, is sufficient to take the case to the jury upon the issue of defendant's actionable negligence, and deny its motion as of nonsuit. *Cook v. Furnace Co.*, 161 N. C., 39, cited as controlling. *Killian v. Quarry Co.*, 672.

20. *Negligence—Ownership—Evidence—Questions for Jury—Passengers—Damages.*—Evidence held sufficient for the jury in this case, that the defendants were mutually and interchangeably engaged under a contract or agreement to transport passengers between two cities, that the driver of the automobile whose negligence caused the injury wore a uniform bearing the appealing defendant's insignia, honored tickets bought for transportation over the other alleged combined lines, and the car was registered as that of such defendant in the department of revenue, the application for certificate so designated it, the appealing defendant received the car from the mechanic and repaired it after the injury, and the president of the appealing defendant corporation acknowledged the ownership of the car by his corporation, etc. *Myers v. Kirk*, 700.

21. *Negligence—Torts—Proximate Cause.*—Where the defendant in the exercise of ordinary care, should reasonably have anticipated that its negligent act would proximately cause an injury, it is not required to make it liable for the consequences of the act, that the particular injury in suit should have been anticipated, if it was the proximate cause and naturally resulted therefrom in continuous sequence. *Hall v. Rinehart*, 706.

22. *Negligence—Contributory Negligence—Rule of Prudent Man.*—Where the servant is engaged in dangerous work, in the course of his employment, he is required for his own safety to use such care as one of ordinary prudence would have used under like circumstances, just as this rule would apply to the duty of the master upon the issue of contributory negligence. *Clinard v. Electric Co.*, 737.

23. *Negligence—Electricity—Dangerous Instrumentalities—Due Care—Evidence—Nonsuit.*—A great degree of care must be exercised by those engaged in the transmission of wires carrying a high and deadly current of electricity used in their business, commensurate with the danger caused to others thereby; and where there is evidence on the trial to recover damages for an injury negligently causing death to plaintiff's intestate, that the defendant had not used instrumentalities provided by other like companies under the circumstances, it is sufficient to take the case to the jury and deny the defendants' motion as of nonsuit. *Helms v. Power Co.*, 784.

24. *Negligence—Master and Servant—Employer and Employee—Reasonable Care—Safe Place to Work.*—It is the duty of the employer to furnish his employee in the exercise of reasonable care, a safe place to work, etc., in the course of his employment. *Watson v. Tanning Co.*, 796.

25. *Negligence—Animals—Master and Servant—Employer and Employee—Evidence—Nonsuit.*—Where the evidence tends only to show that the plaintiff, an employee of the defendant, was experienced in taking

NEGLIGENCE—*Continued.*

care of horses and mules, was injured while in the course of his employment when entering a stall of a mule, by being caught by the animal suddenly turning around and catching him and mashing him between its rump and the side of the stall, causing the injury in suit, without evidence that the mule had by its vicious habits caused injury of this or other like kinds, or that the habits of this particular mule were more vicious than those of mules generally, or that the owner was aware of its being more than ordinarily vicious, defendant's motion for judgment as of nonsuit is properly granted. *Rector v. Coal Co.*, 804.

NEGOTIABLE INSTRUMENTS. See Bills and Notes, 1, 5, 7, 12, 18, 19, 20, 21, 22; Equity, 7.

NEWLY DISCOVERED EVIDENCE. See Appeal and Error, 11.

NEW TRIALS. See Appeal and Error, 11; Railroads, 3.

NOMINAL DAMAGES. See Municipal Corporations, 10.

NONEXPERT TESTIMONY. See Insurance, 19; Wills, 14.

NONRESIDENT. See Insurance, 5.

NONSUIT. See Master and Servant, 2, 3, 12, 13, 17; Carriers, 5; Evidence, 4, 11, 16, 25; Municipal Corporations, 12; Negligence, 17, 23, 25; Railroads, 5; Escape, 1; Intoxicating Liquor, 1.

NOTARIES. See Deeds and Conveyances, 5.

NOTES. See Mortgages, 3; Fraud, 2.

NOTICE. See Deeds and Conveyances, 3; Principal and Surety, 1; Mandamus, 3; Appeal and Error, 11; Evidence, 3; Contracts, 19; Railroads 1, 2, 3; Highways, 5; Constitutional Law, 4; Insurance, 11; Schools, 2, 9, 11; Bills and Notes, 18; Banks and Banking, 29; Tenants in Common, 13.

NUISANCE. See Removal of Causes, 4; Negligence, 9.

OATHS. See Evidence, 20.

OBJECTIONS AND EXCEPTIONS. See Courts, 1; Appeal and Error, 7, 10, 12, 13, 15, 16; Reference, 4; Evidence, 10; Judgments, 19.

OFFICERS. See Banks and Banking, 1, 6, 11, 16, 22, 25; Pleadings, 6; Criminal Law, 5; Arrest, 5; Assault, 1.

OFFSET. See Descent and Distribution, 2.

OPINION. See Instructions, 1, 2; Federal Courts, 1; Insurance, 19.

OPTIONS. See Deeds and Conveyances, 14.

ORDER. See Judgments, 7.

ORDINANCES. See Constitutional Law, 2; Municipal Corporations, 8; Automobiles, 4.

ORDINARY CARE. See Negligence, 8.

OUSTER. See Issues, 3; Tenants in Common, 14.

OWELTY. See Tenants in Common, 13.

OWNERSHIP. See Insurance, 2, 3, 6; Game, 1; Highways, 4; Negligence, 20; Municipal Corporations, 15.

PARENT AND CHILD. See Negligence, 11.

PAROL AUTHORITY. See Deeds and Conveyances, 15.

PAROL EVIDENCE. See Contracts, 3, 5, 7, 15, 23; Bills and Notes, 8, 9.

PARTIES. See Banks and Banking, 22; Garnishment, 1; Contracts, 19; Actions, 2, 4, 5; Judgments, 6, 8, 15; Estoppel, 1; Executors and Administrators, 2; Insurance, 18; Removal of Causes, 8; Tenants in Common, 13.

PARTITION. See Tenants in Common, 12.

PARTNERSHIP. See Tenants in Common, 7.

PASSENGERS. See Negligence, 3, 20.

PAYMENT. See Banks and Banking, 6, 18; Bills and Notes, 10, 19; Mortgages, 3; Insurance, 7, 9, 10; Equity, 4; Tenants in Common, 3; Deeds and Conveyances, 14; Taxation, 6; Vendor and Purchaser, 1.

PENALTIES. See Mechanics' Liens, 2.

"PER CAPITA." See Tenants in Common, 11.

PERSONAL INJURIES. See Negligence, 11.

PERSONAL PROPERTY. See Descent and Distribution, 1; Debtor and Creditor, 1; Wills, 13.

"PER STIRPES." See Tenants in Common, 11.

PETITION. See Removal of Causes, 1; Executors and Administrators, 1; Municipal Corporations, 15.

PHYSICIANS AND SURGEONS. See Homicide, 4; Negligence, 8.

PLEADINGS. See Actions, 3, 5, 7; Appeal and Error, 3, 25; Reference, 2; Judgments, 2, 10, 20; Master and Servant, 3; Insurance, 15, 16; Issues, 1; Banks and Banking, 23; Election of Remedies, 1; Removal of Causes, 7.

1. *Pleadings—Cause of Action—Demurrer.*—When it is alleged in the complaint that the action is upon promissory notes brought six months after maturity with allegations that six months was to be given the payee to liquidate and apply the collateral, which had been done and a balance was still due, the amount involved, a demurrer *ore tenus* to the sufficiency of the complaint to state a cause of action is bad, and may not be aided by counter allegations as to a parol agreement set out by way of answer. *Bank v. McCormick*, 43.

PLEADINGS—*Continued.*

2. *Pleadings—Answer—Issues—Statutes—Suits—Cloud on Title—Equity.* Where the complaint in a suit to remove a cloud upon plaintiff's title to land (C. S., 1743), alleges that the plaintiff is the owner of the *locus in quo*, and asks for a reformation of his deed to the lands to show that by mutual mistake the name of the grantee therein was that of a private business enterprise he was conducting, and that accordingly the defendants claimed an interest therein, an allegation in the answer in reply that the defendant had no knowledge or information sufficient to form a belief as to whether the plaintiff was conducting a business in the name of the grantee in the deed, is sufficient under our statute to raise the issue, and a judgment in plaintiff's favor upon the pleadings is reversible error. C. S., 519. *Brinson v. Morris*, 214.

3. *Pleadings — Issues — Demurrer Ore Tenus in the Supreme Court—Equity—Cloud on Title.*—Where the complaint in a suit to remove a cloud upon plaintiff's title to the *locus in quo* alleges that the defendants claimed an interest therein under a deed which plaintiff seeks to have reformed, and the defendants deny that they have no claim thereto, it is sufficient to raise the issue at least inferentially, and defendant's demurrer *ore tenus* in the Supreme Court to the sufficiency of the complaint to state a cause of action, will be denied. *Ibid.*

4. *Pleadings—Demurrer.*—Under our Code system, a pleading will not be overthrown by demurrer if liberally construed in favor of the pleader a cause of action is therein stated, however inartificially it may have been drawn, or redundantly stated. *S. v. Trust Co.*, 246.

5. *Same—Admissions.*—By demurring to the sufficiency of a complaint to state a cause of action, the defendant admits every allegation of a material fact properly pleaded. *Ibid.*

6. *Same—Banks and Banking—Corporations—Officers—Mismanagement.*—In an action by the receiver of a bank to enforce individual liability against the directors and officers thereof for its negligent mismanagement, allegations in effect that defendant and others were active in its control and operation as officers and directors in the invalid transactions constituting the mismanagement, etc., is a sufficient charge of having committed the unlawful act to overthrow his demurrer. *Ibid.*

7. *Pleadings—Allegations.—Held*, under our Code procedure, the allegations of the complaint were sufficiently definite to allege a cause of action against the railroad company for damages to land caused by its negligent failure to maintain a proper drainage of its right of way, under the easement contract. *Clark v. R. R.*, 280.

8. *Pleadings—Demurrer.*—Demurrer to complaint in an action for abuse of process will not be upheld if any part of the pleadings liberally construed will sustain the action. *Griffin v. Baker*, 297.

9. *Pleadings—Demurrer—Statutes—Remedy.*—An amendment to a statute which affects the remedy should be taken advantage of by answer and not by demurrer. *State Prison v. Bonding Co.*, 391.

10. *Pleadings—Allegations—Fraud.*—Allegations of fraud to disprove that a check accepted in full for services rendered must be sufficiently

PLEADINGS—*Continued.*

alleged in the complaint in all its essential elements to admit of parol evidence to the contrary. *Hoggard v. Brown*, 494.

11. *Same—Evidence.*—Evidence of fraud in the procurement of a receipt, in this case written upon a check cashed by the creditor, is erroneously admitted when the allegations of the complaint are insufficient. *Ibid.*

12. *Same—Debtor and Creditor—Receipts—Checks.*—Where the creditor has received a check with entry thereon it was in full for services rendered, allegations of fraud in its procurement, that she could barely more than write her name, without averment that she was so situated as not to have the check read to her or otherwise inform herself of the contents, is insufficient to admit of parol evidence to the contrary. *Ibid.*

13. *Pleadings—Demurrer—"Speaking" Demurrer.*—Construing pleadings upon demurrer, the allegations thereof are admitted with all reasonable inferences therefrom in favor of the pleader, and where to sustain the demurrer it becomes necessary to set up further matter in defense, it is bad as a speaking demurrer. *Way v. Ramsey*, 549.

14. *Pleadings—Deceit—Tort—Allegations—Evidence.*—It is necessary that plaintiff allege sufficient facts to constitute the deceit or tort of defendant, causing damages in suit, to admit of evidence thereof. *Stone v. Milling Co.*, 585.

15. *Pleadings—Answers—Defenses—Counterclaim.*—Where the answer to the complaint sets up no new matter, but its allegations are entirely in defense, a replication by the plaintiff is unnecessary. C. S., 525. *Simon v. Masters*, 731.

PLEAS IN BAR. See Reference, 2.

PLEDGES. See Debtor and Creditor, 1.

POLICE POWERS. See Constitutional Law, 3; Statutes, 8.

POLICY. See Insurance, 1, 2, 3, 7, 9, 11, 13, 14, 15, 18, 20; Evidence, 15; Instructions, 7.

POSSESSION. See Tenants in Common, 1; Debtor and Creditor, 1; Mortgages, 5, 6.

POWERS. See Highways, 1; Constitutional Law, 4; State Highway Commission, 1, 2.

PREJUDICE. See Appeal and Error, 1; Courts, 1; Instructions, 6.

PREMIUMS. See Insurance, 3, 7, 9, 10.

PRESUMPTIONS. See Carriers, 2; Banks and Banking, 4; Wills, 7; Contracts, 10; Deeds and Conveyances, 6; Injunction, 1; Appeal and Error, 14; Executors and Administrators, 3; Reference, 7.

PRIMA FACIE CASE. See Carriers, 1; Negligence, 16; Intoxicating Liquors, 2.

PRIMARIES. See Mandamus, 1, 2.

PRINCIPAL AND AGENT. See Agency; Schools, 7; Insurance, 4, 10, 13; Actions, 2; Municipal Corporations, 2; Contracts, 11, 17; Mechanics' Liens, 1; Master and Servant, 25; Debtor and Creditor, 2; Deeds and Conveyances, 15, 20; Trespass, 2; Religious Societies, 1; Corporations, 4.

1. *Principal and Agent—Undisclosed Principal—Respondeat Superior.*—A materialman who has furnished to the agent of the owner material for the construction or repair of his building may hold the owner liable for the purchase price as an undisclosed principal, and enforce his lien upon afterwards discovering this relationship. *Lumber Co. v. Motor Co.*, 378.

PRINCIPAL AND SURETY. See Highways, 6, 10; Mechanics' Liens, 4, 5, 6; Banks and Banking, 25; Municipal Corporations, 9; Arrest, 6; Judgments, 1; Actions, 4, 6; Claim and Delivery, 1; Bills and Notes, 8; Equity, 4.

1. *Principal and Surety—Surety Bonds—Defalcation of Principal—Notification—Substantial Compliance.*—The stipulation as to immediate notification by the indemnified of defalcation of an employee covered by the bond to a company whose business is that of a surety, are construed in case of ambiguity in its expression more strongly against the company, and compliance by the indemnified, so as to put it upon reasonable notice, is held sufficient under the facts of this case. *Loan Association v. Davis*, 108.

2. *Same—Evidence—Concealment of Defalcation—Experts—Accountants.* Where the indemnified has substantially complied with the stipulations of the bond in notifying the surety company within the time required by specifying the default within three classifications, it is competent to show by expert accountants who have made a personal investigation that certain transactions had the effect of covering up or concealing the defalcation specified in the notification to the defendant insurer. *Ibid.*

3. *Same—Suspicion as to Defalcation.*—The requirement in the written bond of indemnity that the insured notify the insurer company immediately upon defalcation of the principal in the bonds, is sufficiently complied with if the notification be given within the time required after the insured had been reasonably satisfied, upon investigation, of the fact, and it is not required that immediately upon a suspicion notice should have been given. *Ibid.*

4. *Same—Instructions.*—An instruction upon competent evidence that the insured had substantially complied with the requirement to immediately notify the surety company of the defalcation of the principal upon the bond, is held to be correct under the facts of this case. *Ibid.*

5. *Principal and Surety—Equity—Equality of Liability—Roads and Highways—State Highway Commission—State's Prison—Laborers and Materialmen.*—Where a contractor with the State Highway Commission has furnished a bond sufficient for the protection of laborers on and material furnished for a State highway, and the contractor has contracted with the State's prison to furnish him convict labor for the work, and having defaulted under his contract for the erection of the highway, owes for the work and labor done thereon, the equitable doctrine of equality will apply, and each surety will be equally liable with the other, the doctrine of primary and secondary liability among the sureties not applying. *State Prison v. Bonding Co.*, 392.

PRIVITY. See Attachment, 1; Deeds and Conveyances, 2; Wills, 20.

PRISONER. See Appeal and Error, 1; Courts, 1.

PRIVIES. See Estoppel, 2.

PROBATE. See Deeds and Conveyances, 3, 4, 18; Tenants in Common, 4.

PROCEDURE. See Estates, 3; Judgments, 7; Executors and Administrators, 1; Master and Servant, 9.

PROCESS. See Insurance, 5; Summons, 1.

1. *Process—Actions—Abuse of Process.*—Abuse of process is the unlawful use of the process regularly issued, in proper form, from the court. *Griffin v. Baker*, 297.

PROPERTY. See Claim and Delivery, 1; Taxation, 1, 2; Municipal Corporations, 15.

PROXIMATE CAUSE. See Negligence, 4, 5, 6, 15, 16, 21; Master and Servant, 5; Railroads, 5.

PUBLIC BUILDINGS. See Municipal Corporations, 9.

PUBLIC UTILITIES. See Municipal Corporations, 1; Highways, 10.

PURCHASE MONEY.

1. *Purchase-Money Mortgage—Ratification.*—Words in a subsequent mortgage referring to a prior purchase-money deed of trust by declaring the land "free and clear of all encumbrances, except one note for purchase money due in 1922," is a mere reference, and does not amount to a ratification of the prior purchase-money deed so as to cure the purchase-money deed of invalidating defects of probate. *Hardy v. Abdallah*, 45.

PURCHASER. See Bills and Notes, 8; Railroads, 2; Taxation, 9.

PURCHASE PRICE. See Descent and Distribution, 1.

QUESTIONS AND ANSWERS. See Appeal and Error, 1; Instructions, 1; Evidence, 19.

QUESTIONS FOR JURY. See Negligence, 2, 4, 10, 16, 17, 20; Insurance, 16; Husband and Wife, 1; Contracts, 24, 28; Highways, 9, 12; Rewards, 1; Deeds and Conveyances, 17; Railroads, 5; Judgments, 18; Arrest, 4; Evidence, 17, 24; Master and Servant, 17, 22.

QUESTIONS OF LAW. See Contracts, 17; Highways, 12; Appeal and Error, 28; Deeds and Conveyances, 17; Instructions, 8; Judgments, 16, 18; Schools, 12; Evidence, 24.

RAILROADS. See Carriers, 3, 4, 5; Negligence, 4, 17; Deeds and Conveyances, 9; Government, 1.

1. *Railroads — Judgments — Consent Judgments—Easements—Notice.*—A paper-writing executed by the plaintiffs' predecessor in title, duly registered, that the defendant should construct certain ditches and keep them open, etc., for the flow of the surface water, creates an easement upon the plaintiffs' land, in accordance with the intent and purpose of the writing, and gives notice to the plaintiffs' successors in title, the plaintiffs in the present action. *Clark v. R. R.*, 280.

RAILROADS—*Continued.*

2. *Same—Purchaser With Notice—Id Certum Est Quod Certum Reddi Protest.*—Where certain easements are created on lands in favor of a railroad in relation to maintaining ditches on lands, etc., those who afterwards acquire title are fixed with knowledge of the location of these ditches and the extent of the easement acquired by the railroad, when the original location of the ditches, etc., may be definitely ascertained, under the principle of *id certum est quod certum reddi protest. Ibid.*

3. *Same—Notice—Appeal and Error—New Trials.*—In an action to recover damages to crops, etc., against defendant railroad company, alleged to have been caused to plaintiffs' lands by ditches cut for carrying off surface waters, parol evidence of such damages contrary to the easement granted by the plaintiffs' predecessor in title, of which plaintiffs had constructive notice, is prejudicial to the defendant, and constitutes reversible error. *Ibid.*

4. *Railroads—Crossings—Negligence—Motor Cars.*—In the running of motor cars upon its tracks a railroad company is required to observe the same care in approaching a frequented highway or road crossing as in the operation of its trains thereon. *Franklin v. R. R.*, 717.

5. *Same — Evidence—Contributory Negligence—Proximate Cause—Questions for Jury—Nonsuit.*—Where there is evidence that a pedestrian upon a public road saw defendant railroad company's motor car standing upon one of its tracks about fifty or seventy-five yards from the point the road crossed the railroad tracks, and at this point he was a few minutes thereafter injured by the motor car coming without signal or warning and without his knowledge of its approach until it was upon him, it is for the jury to determine the question as to whether the negligence of the defendant or that of the plaintiff was the proximate cause of the resulting injury, and to deny defendant's motion as of nonsuit thereon. *Ibid.*

6. *Same—Warnings.*—Testimony of the plaintiff that he had not heard the required signals or warnings from a motor car of defendant railroad company as it approached on the defendant's track a frequented highway or road crossing, is legal evidence that such warnings were not given. *Ibid.*

7. *Railroads—Crossings—Contributory Negligence.*—It is required of a person to make diligent use of his senses to discover whether there is danger in crossing a railroad track in constant use. *Ibid.*

RAPE. See Appeal and Error, 1.

1. *Rape—Alibi—Evidence—Identification.*—Where the defense of an alibi is relied upon on a trial for rape, where the prosecutrix has positively identified the prisoner as the man who committed the assault upon her, it is competent as *pars rei gestæ* for her to testify that shortly theretofore she had seen the prisoner slinking along the country road she was walking towards the scene of the crime, and that she said to herself, "I wonder why that negro is looking at me that way," identifying by her positive evidence this negro as the one who shortly thereafter committed the assault upon her. *S. v. Mansell*, 20.

RAPE—*Continued.*

2. *Same—Evidence—Corroborative Evidence.*—Where the identity of the prisoner is controlling in an action for rape, and the prosecuting witness has testified thereto, it is competent for the sheriff to testify as corroborative evidence former occasions, after the offense had been committed, on which in his presence the prosecutrix had identified the prisoner as the one who made the assault. *Ibid.*

3. *Same.*—Upon the question of identity of the prisoner on trial for rape and assault, where the other evidence is sufficient thereon, it is competent for a witness to testify that he had several times before the commission of the offense seen the prisoner "slinking" along the road in that locality, as tending to show the prisoner knew the place, etc., along with the other evidence tending to establish his identity. *Ibid.*

4. *Rape—Assault—Evidence—Identity.*—Where in an action for rape the defense is an alibi, and the prosecutrix has positively identified the prisoner as her assailant, and her testimony was corroborated by the other State's witnesses, evidence that the defendant was identified as the assaulter the next morning after he was arrested was not erroneously admitted. *S. v. Jeffreys*, 318.

5. *Same—Declarations.*—In an action for rape, testimony that the prosecuting witness said soon after the assault "she could hardly sit up," is competent to show the assault had been committed, when the identity of the defendant has been shown. *Ibid.*

RATIFICATION. See Insurance, 4; Purchase Money, 1.

REASONABLE TIME. See Contracts, 14, 28; Landlord and Tenant, 2.

RECEIPTS. See Deeds and Conveyances, 10; Pleadings, 12; Carriers, 7.

RECEIVERS. See Banks and Banking, 12, 17, 22, 27; Descent and Distribution, 2.

RECITALS. See Deeds and Conveyances, 10.

RECORD. See Appeal and Error, 4, 20, 25, 31; Banks and Banking, 10; Estoppel, 2; Habeas Corpus, 3; Election of Remedies, 2; Reference, 8.

REFERENCE. See Deeds and Conveyances, 1; Contracts, 8; Appeal and Error, 13, 30; Banks and Banking, 21.

1. *Reference—Statutes.*—When the matter in dispute involves a long itemized accounting by the payee of a note for a period of six months in excess of five hundred dollars, formerly cognizable by courts of equity: *Held*, a compulsory order of reference, over objection of a party, was proper under the provisions of C. S., 573 (1), (5). *Bank v. McCormick*, 43.

2. *Same—Pleas in Bar—Pleadings—Causes of Action.*—A party to an action may not successfully object to a compulsory reference when the same is allowed by our statute, C. S., 573 (1), (5), and the complaint states a good cause of action, and no complete plea in bar to the entire cause is set up by him. *Ibid.*

3. *Reference—Exceptions—Trial by Jury—Evidence.*—Where a party to an action has duly excepted to a compulsory reference and has not

REFERENCE—*Continued.*

thereafter waived or lost his right to a trial by jury, he may have the issues raised by him passed upon by the jury upon the record and evidence taken before the referee. *Ibid.*

4. *Reference — Trial by Jury — Objections and Exceptions—Issues.*—In order for either party to a compulsory reference under our statute to preserve his right to a trial by jury, he must except to the order at the time it is made, and preserve this right by filing exceptions to the report of the reference, if adverse, and further tender proper issues and demand a jury trial thereon. If the report of the referee be favorable, he must tender issues and demand a jury trial on his adversary's exceptions. *Jenkins v. Parker*, 188.

5. *Reference—Findings—Appeal and Error.*—The findings of fact by the trial judge upon the report of a referee, supported by competent evidence, are not reviewable on appeal. *Hardy v. Thornton*, 296.

6. *Reference—Evidence—Findings of Fact—Appeal and Error—Review.*—Upon the coming in of the report of the referee, it is required of the trial judge to pass upon the evidence and the findings of fact, with the power to change or modify the findings upon supporting evidence, and when this is done in conformity with the law, the findings so made are not reviewable on appeal in the Supreme Court. *Greer v. Comrs. of Watauga*, 714.

7. *Same—Presumptions.*—Where the Superior Court judge reverses the conclusions of law of the referee and the record is silent as to any findings of fact made by him, it will be presumed that he approved of the findings of fact by the referee set out in the record. *Ibid.*

8. *Same—Conclusions of Law—Record.*—Where the plaintiff seeks to recover damages for the taking of his land for the use of a public highway, without compensation, and the cause has been referred to a referee, who has found as a fact that the special advantages will equally offset the value of the land so taken, a conclusion of law of the judge thereon awarding plaintiff additional damages without change in the referee's findings of fact is unsupported by the facts found, and the cause will be remanded to be proceeded with in the due course and practice of the courts. *Ibid.*

REFORMATION OF INSTRUMENTS. See Equity, 1.

REGISTRATION. See Deeds and Conveyances, 3, 6, 18.

RELEASE. See Estates, 4; Bills and Notes, 21.

RELIGIOUS SOCIETIES. See Taxation, 8; Benevolent Societies.

1. *Religious Societies—Churches—Ministers of the Gospel—Contracts—Principal and Agent—Salaries.*—A body of men constituting a religious denomination is a *quasi* corporation, and confers upon its duly appointed officers or trustees the power to make contracts with pastors or ministers of the Gospel to take charge of its religious affairs, and when these properly constituted agencies, acting alone as such, make a contract of this character, they are not liable individually for the payment of the salary agreed upon to be paid by the congregation they represent. *Way v. Ramsey*, 549.

RELIGIOUS SOCIETIES—*Continued.*

2. *Same.*—A contract made by the congregation of a church for the payment of the salary of their duly appointed minister of the Gospel is enforceable in certain instances. *Ibid.*

REMAINDERS. See Wills, 9; Estates, 4, 7.

REMEDIES. See Taxation, 4; Pleadings, 9.

REMOVAL OF CAUSES. See Courts, 3.

1. *Removal of Causes—Federal Courts—Sufficiency of Allegations—Petition.*—In a petition for removal, allegations that the joinder of a resident and nonresident defendant was made for the purpose of preventing a removal, and mere statements that the joinder was fraudulently made for this purpose are not sufficient. Facts must be particularly alleged forcing the conclusion that the action is separable and the joinder was fraudulent and without right. *Patton v. Fibre Co.*, 48.

2. *Same—Matters of Defense.*—A general denial of the liability of the resident defendant, and the pleading of the statute of limitations, are matters of defense, and cannot successfully be used to support a petition for removal. *Ibid.*

3. *Same—Prior Actions.*—In a petition for removal of a cause to the Federal Court, for diversity of citizenship, an allegation that a prior action on the same cause of action was brought against the nonresident defendant, removed to the Federal Court, and that plaintiff took a nonsuit therein, does not alone have the effect of proving in a subsequent action wherein a resident defendant is joined, that the joinder was fraudulent. *Ibid.*

4. *Removal of Causes—Federal Court—Nuisance—Joint Tort—Severable Controversy.*—Where a town commits a nuisance to the plaintiff's special damage by emptying its sewage into a stream flowing by plaintiff's residence, and a nonresident defendant also commits a like nuisance by maintaining a tannery thereon, and the nuisance of them both are aggravated by the damming of the stream by another resident defendant, the acts of the three, thus uniting, constitutes a joint tort, and the nonresident defendant is not entitled to have the cause removed from the State to the Federal Court on the ground that the cause of action against it was severable, and complete relief could be afforded against it in the Federal Court, without reference to a fraudulent joinder of the resident defendants for the purpose of defeating the jurisdiction of the Federal Court. *Moses v. Morganton*, 102.

5. *Removal of Causes—Diverse Citizenship—Waiver.*—Under the Federal statute the State and the Federal courts have concurrent jurisdiction over causes removable from the State to the Federal Court, coming within its provisions between a citizen of this State and a nonresident defendant corporation of another state, with the right of the defendant to remove the cause from the State to the Federal Court upon the filing of a proper petition and bond, according to the requirements of the Federal statute, unless this right has in some recognized way been waived by it. *Butler v. Armour*, 510.

REMOVAL OF CAUSES—*Continued.*

6. *Same—Corporations.*—A corporation of another state, existing under its laws with the right of conducting its business in this jurisdiction, for the purpose of exercising the right in proper instances may remove a cause against it from the State to the Federal Court, under the Federal statute. *Ibid.*

7. *Removal of Causes—Courts—Jurisdiction—Pleadings—Waiver—Judgments—Estoppel.*—Where, by consent of a nonresident defendant, a cause is retained in the State court, and the judge thereunder has granted the nonresident defendant, within its discretion, time to answer the complaint beyond that which the State statute allows, 3 C. S., 509, the nonresident waives his right to remove, and is thereafter estopped from asserting it by filing a proper petition and bond in conformity with the Federal Removal Act, relating to diverse citizenship. *Ibid.*

8. *Removal of Causes—Federal Court—Diverse Citizenship—Misjoinder—Parties.*—Where a nonresident defendant and its resident foremen are liable for the negligent death of plaintiff's intestate, the former in failing to furnish reasonably safe instrumentalities and the latter in directing the continuance of the employment thereunder, the liability is joint and not severable, and defendant's motion to remove the case to the Federal Court for misjoinder of parties, under the Federal statutes, will be denied. *Carroll v. Products Corporation*, 710.

RENTS AND PROFITS. See Mortgages, 5.

REORGANIZATION. See Banks and Banking, 29, 31.

REPAIRS. See Landlord and Tenant, 1.

REPEAL. See Statutes, 2, 5, 6.

REPUTATION. See Criminal Law, 2.

REQUESTS. See Instructions, 10, 15; Judgments, 15.

REQUISITIONS. See Certiorari, 1.

RESCISSION. See Contracts, 10.

RESIDUARY CLAUSE. See Wills, 5.

RES IPSA LOQUITUR. See Evidence, 12.

RESOLUTION. See Banks and Banking, 26.

RESPONDEAT SUPERIOR. See Contracts, 18; Principal and Agent, 1.

RESTRAINT ON ALIENATION. See Deeds and Conveyances, 19.

RESULTING TRUSTS. See Tenants in Common, 4; Trusts, 1.

REVENUE. See Taxation, 1.

REVERSAL. See Courts, 2.

REVIEW. See Schools, 1; Appeal and Error, 23, 25, 27; Judgments, 16; Reference, 6; Certiorari, 1.

REWARDS. See Appeal and Error, 21.

1. *Rewards—Criminal Law — Evidence—Issues — Questions for Jury.* — Where the proper municipal authorities have offered a reward for the arrest and conviction of the one who has committed a murder, and there is evidence tending to show, and *per contra*, that the plaintiff, by persuasion, had induced the one afterwards convicted of the offense to go with him in his automobile, and thus delivered the murderer to the municipal authorities: *Held*, the rights of the plaintiff to the reward was properly made to depend upon whether the plaintiff's persuasion had induced the murderer to give himself up, or whether he had otherwise voluntarily done so, the issue to be determined by the jury under conflicting evidence. *Russell v. Wilmington*, 480.

RIGHTS. See Mechanics' Liens, 2; Bills and Notes, 22.

RIGHTS AND REMEDIES. See Government, 1.

ROADS AND HIGHWAYS. See Highways, 1, 3, 4, 5, 6; Automobiles, 1; Principal and Surety, 5; Government, 1.

ROBBERY.

1. *Robbery—Indictment—Highways—Forcible Taking of a Thing of Value —Criminal Law.*—As to the place charged in the offense of highway robbery, it is only necessary for the indictment to charge that it was committed in or near a highway, and that the defendant charged therewith feloniously and forcibly took from the State's prosecuting witness goods or money of any value by violence or putting him in fear, etc. *S. v. Holt*, 490.

2. *Same—Statutes—Less Degree of Same Crime—Assault—Evidence—Verdict.*—An assault upon the person is a necessary ingredient to be charged in an indictment for highway robbery, and under an indictment for this offense the lesser degree of crime of an assault with a deadly weapon, where a pistol is used, is included in the greater offense charged, and under conflicting evidence as to whether highway robbery or an assault only with a deadly weapon has been committed, the jury may find verdict for the lesser offense. C. S., 4639. *Ibid.*

3. *Same—Instructions.*—Where the indictment is sufficient and the evidence is conflicting as to whether the defendant committed highway robbery or an assault with a deadly weapon, the jury may find for the lesser offense, and it is the duty of the trial judge to so instruct the jury, though a special request therefor had not been aptly tendered in writing. C. S., 565, 4639, 4640. *Ibid.*

ROUTE. See State Highway Commission, 1.

RULES OF COURT. See Appeal and Error, 2, 6, 13.

RULE OF PRUDENT MAN. See Contracts, 24; Negligence, 13, 15, 17, 22; Master and Servant, 18.

RULE IN SHELLEY'S CASE. See Estates, 10, 11.

SAFE PLACE TO WORK. See Negligence, 1, 19, 24; Evidence, 16; Master and Servant, 17, 18.

SAFETY. See Courts, 1; Municipal Corporations, 11; Automobiles, 2; Master and Servant, 20, 22.

SALARIES. See Religious Societies, 1.

SALES. See Mortgages, 1, 4; Municipal Corporations, 2; Tenants in Common, 3; Executors and Administrators, 1.

SCHOOLS. See Judgments, 4; Statutes, 6, 7; Mechanics' Liens, 4; Taxation, 9.

1. *Schools—School Districts—Appeal and Error—Findings of Fact—Review.*—Upon appeal from a restraining order, the Supreme Court is not concluded by the facts found by the Superior Court judge in passing upon the question as to whether the county-wide plan of schools has been legally adopted as the statute requires, and its effect upon its repeal of a special school district theretofore existing under special statutes relating to the schools of the county, and the Supreme Court may review the evidence and make its own conclusions of law therefrom. 3 C. S., 5481 (1). *Causey v. Guilford County*, 298.

2. *Schools—County Board of Education—Change in Plans—Notice—Statutes.*—Our statute requiring the county board of education, before changing the system of the schools from an existing one, to notify by publication, etc., interested patrons, and in a prescribed way the committeemen of the district included in the contemplated change, is only for their meeting to be held in an advisory capacity, not binding on the board, and when the statute has been complied with before the adoption of such plans, the action of the board is final without further notice, when the provisions of the statutes on the subject have been complied with. 3 C. S., 5481 (2). Public Laws 1924, Ex. Ses., ch. 121. *Ibid.*

3. *Schools—School Districts—Statutes—Surrender of Charter—New Districts.*—Where, in contemplation of making a change from a special charter district to one authorized under our general statute, the board of trustees of the existing district passes a resolution requesting the county board of education of the proposed district to assume full jurisdiction and directing the execution of quitclaim deed conveying title to its school property, may operate as a surrender of its charter, and objection that the special district continues to exist and function is untenable. C. S., 5430. *Ibid.*

4. *Schools—School Districts—Indebtedness of Special District Included in New One—Statutes—Local Tax Districts.*—Where a special school district with an existing indebtedness has been included in the creation of a larger district, the formation of the new district without provision therefor in effect retains the indebtedness only on the special district incorporated therein, and is valid under our general statutes on the subject, the old district for the purpose becoming a local tax district. School Code, secs. 157, 238. 3 C. S., 5555. *Ibid.*

5. *Schools—Constitutional Law—Statutes.*—The Legislature alone is given by our Constitution the power to provide by taxation and otherwise for a general and uniform system of public schools. Const. of N. C., Art. VII, sec. 7. *Tate v. Board of Education*, 516.

6. *Same—Municipal Corporations—Cities and Towns.*—Where, upon petition by the school board, the board of county commissioners have approved the former finding as to the necessity of additional school houses as necessary to provide for a six months term therein for pub-

SCHOOLS—*Continued.*

lic schools in certain of its districts, it is within the province of the Legislature to provide for the school buildings, and an issuance of bonds for this purpose, without statutory authority, is invalid. Const. of N. C., Art. IX, sec. 3; Art. VII, sec. 7. *Ibid.*

7. *Same—Government—School Commissioners—Principal and Agent.*—As a ministerial agent of the State, the duty of the county board of education is to maintain the six months terms of public schools required by Art. VII, sec. 7, and determine the necessity therefor, though the power of taxation to erect buildings for this purpose is within the duty of the Legislature by enacting appropriate statutes. *Ibid.*

8. *Same—Demurrer.*—Where the complaint fails to show that the county commissioners, acting upon the recommendation of the school board, were with statutory power to issue bonds for the erection of additional school buildings to carry on six months terms in certain school districts; but to the contrary, a demurrer to the complaint is good. *Ibid.*

9. *Schools—Taxation—County-wide Plans—Statutes—Elections—Notice—Bond Issues.*—Where a county-wide plan of education has been duly adopted under the provisions of our statute, 3 C. S., 5481, and an existing school district has been added to others in the formation; and upon a proper petition the board of county commissioners have duly ordered an election to ascertain the will of the voters upon the question of issuing bonds for school purposes therein, the result of the election approving the issuance of the bonds will not be impaired upon the ground that notice of the election was only published twice in a newspaper, when the statute requires its publication three times, by reason of the fact that the notice of the election and that of registration were published in the same issue of the newspaper, and therefore not thus given thirty days at least before the election, when there is no suggestion that the election would have been changed. *Flake v. Comrs. of Anson*, 590.

10. *Same—Mandatory and Directory Statutes.*—Under our statute requiring the publication of notice three times in a newspaper published in a county, the first at least thirty days before an election, to ascertain whether the electors of a school district approved the issuance of bonds therein for school purposes: *Held*, the requirements of the statute as to the first publication in a newspaper, etc., and the giving of the specified time are mandatory if they affect the merits of the election, and directory if they do not. *Ibid.*

11. *Same—Technical Error of Publishing Notice as to the Statute.*—Where the board of county commissioners has ordered an election to be held in a new school district created under the provisions of 3 C. S., 5481, the validity of the election approving the issuance of the bonds will not be necessarily affected by the fact that the commissioners determined that the election should be held under the provisions of one valid statute, and the published notice erroneously stated it was to be held under a different one.

12. *Same—Questions of Law—Issues—Jury.*—Where it appears from the judgment and the record on appeal that the issuance of school bonds for a certain new district were not invalid for the failure to publish the notice of the election in three issues, the first at least thirty days

SCHOOLS—*Continued.*

before the time of election, as a matter of law, no issue upon this question is raised that requires the determination of a jury. Instances where such districts are consolidated, distinguished. *Ibid.*

SCIENTER. See Contracts, 10.

SEALS. See Deeds and Conveyances, 6.

SEARCH WARRANT. See Homicide, 8.

SECRETARY OF STATE. See Insurance, 5.

SEDUCTION. See Criminal Law, 8.

SELF-DEFENSE. See Homicide, 1, 3.

SERVICE. See Insurance, 5.

SETTLEMENT. See Appeal and Error, 18.

SHAREHOLDERS. See Banks and Banking, 11, 17.

SHERIFF. See Attachment, 3; Claim and Delivery, 1.

SIDEWALKS. See Municipal Corporations, 11.

SIGNALS. See Carriers, 3; Automobiles, 1.

SPECIFIC LEGACIES. See Wills, 15.

SPIRITUOUS LIQUOR. See Intoxicating Liquor.

STATE BOARD. See Mandamus, 2.

STATE HIGHWAY COMMISSION. See Highways, 1, 3; Principal and Surety, 5; Government, 1.

1. *State Highway Commission—Discretionary Powers—Courts—Change of Route—Statutes—Highways—Injunction.*—Where the State Highway Commission has taken over a certain public road within a county, as a link in the State system of public highways, and the county in which it is situate has contracted to loan the State Commission a certain amount of money to be expended on its improvement, subject to the approval of the voters in issuing bonds for the purpose, and there is nothing in the contract that would require the route of the existing road to continue as it then was laid out: *Held*, the discretionary power vested in the State Highway Commission as to changing the route, vesting in them by statute, will not be interfered with by the courts, at the suit of the taxpayers residing in a corporated or unincorporated town, contending that they would not have voted for the bond issue except upon representation made to them that the then existing route would not be changed. As to whether an unincorporated town is a "principal town" within the meaning of the statute. *Quære. Johnson v. Comrs. of Wake*, 561.

2. *Same—Contracts—Agreements Made Beforehand as to Exercise of Discretionary Powers.*—The State Highway Commission, neither by contract nor otherwise, can be controlled beforehand in the exercise of its discretion, conferred on it by statute, as to the change of location of a public highway. *Ibid.*

STATEMENT. See Appeal and Error, 20; Evidence, 14.

STATES. See Deeds and Conveyances, 5.

STATE'S PRISON. See Highways, 6; Principal and Surety, 5.

STATUTES. See Instructions, 1, 2, 5, 15; Wills, 7, 10, 12, 19; Deeds and Conveyances, 2, 3, 7, 18; Highways, 1, 3, 4, 5, 7, 9; Reference, 1; Estates, 1, 6; Insurance, 5, 17; Claim and Delivery, 1; Criminal Law, 2, 8; Judgments, 2, 6, 12, 21; Taxation, 1, 4, 5, 7; Pleadings, 2, 9; Descent and Distribution, 1, 2; Municipal Corporations, 4, 5, 6, 8, 15; Banks and Banking, 17, 21, 22, 25; Bills and Notes, 12, 16, 19, 22; Fertilizers, 1; Schools, 2, 3, 4, 5, 9, 10, 11; Actions, 6; Mechanics' Liens, 5, 7; Corporations, 2; Tenants in Common, 3, 4, 9, 12; Evidence, 9, 10, 11, 16; Conflict of Laws, 1; Drainage Districts, 1; Equity, 7; Government, 1; Homicide, 8; Negligence, 16, 18; Trusts, 1; Executors and Administrators, 1; Master and Servant, 8, 11; Robbery, 2; State Highway Commission, 1; Summons, 1; Arrest, 3.

1. *Statutes—Constitutional Law—Invalid in Part—Legislative Intent—Constitutional in Part.*—Where a statute imposes a license tax for hunting game upon the residents of the county, and a larger tax is imposed upon the residents of other counties thereof, the legislative intent will not be construed to permit the residents beyond the county boundaries to hunt the game therein without the payment of any tax, and they are required to pay the same tax imposed on the residents of the county. *S. v. Barkley*, 184.

2. *Statutes—Interpretation—Repeal by Implication.*—The law does not favor a construction of a later statute that repeals a prior one on the same subject-matter by implication, or without express words to that effect, and will not so construe it unless it clearly appears that the legislative intent was to do so, and then only to the extent that is necessary to make a construction of the two statutes consistent and reasonable. *Litchfield v. Roper*, 202.

3. *Same—Banks and Banking.*—C. S., 423, under which action must be brought against a stockholder of a bank since becoming insolvent to enforce his additional liability on his shares of stock therein, 1 C. S., 237; 3 C. S., 218 (a), 219 (a), is by chapter 4, Public Laws 1921, extended to an action by the receiver to recover therefor to ten years from the discovery of the condition of the insolvent bank. C. S., 240. *Ibid.*

4. *Same—Intent.*—While by a complete or entire codification of the laws upon a specific subject, former statutes upon the subject may be construed to have been repealed by implication when not therein included, the principle will not apply when from a proper interpretation of the codified laws it appears that the legislative intent was only to enlarge the former law. *Ibid.*

5. *Same—Repealing Clause.*—The codification of the laws by legislative enactment, repealing all laws in conflict therewith, does not repeal a former law upon the same subject-matter when it appears by proper interpretation that the legislative intent by the later law was to enlarge the provisions of the former one. *Ibid.*

6. *Statutes—Repeal—Schools—School Districts.*—*Held*, the school code under which a county board of education may change from an existing

STATUTES—*Continued.*

system of public schools to that therein provided (Public Laws of 1923, ch. 136, art. 6; 3 C. S., 5481), expressly repeals all former laws in such instances, including a provision in a special act providing that the school district therein created shall continue to be an independent school dstrict, and shall have exclusive control of its public free schools. *Causey v. Guilford County*, 298.

7. *Statutes—Interpretation—Schools—School Districts.*—Statutes relating to a change of school districts within a county are to be liberally construed to effectuate the legislative intent. *Ibid.*

8. *Statutes—Municipal Corporations—Police Powers—Constitutional Law—Discrimination—Certiorari.*—Where, in pursuance of authority conferred by statute a city has divided its territory into certain zones or districts, giving an inspector certain judicial powers as to kind or class of buildings to be erected therein, under a board of adjustment and review, providing also for *certiorari* to issue from the courts, the requirements for each zone or district uniform and for the health, morals and safety of its citizens, is a valid exercise of such powers, both as to the statute conferring the same and the ordinance, and is not contrary to our organic law inhibiting discrimination. 3 C. S., 2776 (r-aa). *Harden v. Raleigh*, 395.

9. *Same — Gasoline-Filling Stations — Automobiles.* — Where there has been uniformity in the creation and exercise of the authority under an ordinance passed in pursuance of statute, in refusing to permit the erection of a gasoline filling station in a proper district, there is no violation of the Constitution against discrimination. *Ibid.*

10. *Statutes—Declaratory Statute—Insurance, Life—Medical Examination.* The amendment by ch. 82, Public Laws of 1925, to C. S., 6460, was declaratory of the existing law with regard to the medical examination of the applicant for a policy of life insurance. *McNeal v. Ins. Co.*, 450.

11. *Statutes—Interpretation—Clerks of Court—Certificates — Deeds and Conveyances.*—The requirements of 3 C. S., 3305, that the clerk of the court shall pass upon the sufficiency of the probate of a deed, is mandatory and not directory. *Woodlief v. Woodlief*, 635.

STATUTE OF FRAUDS. See Contracts, 3.

STATUTE OF LIMITATIONS. See Mortgages, 6.

STIPULATIONS. See Insurance, 18, 20, 21; Landlord and Tenant, 1.

STOCK. See Corporations, 2; Wills, 15.

STOCKHOLDER. See Corporations, 1.

STREETS. See Municipal Corporations, 3, 5, 6, 11, 15.

SUBROGATION. See Banks and Banking, 6, 7, 12, 14; Bills and Notes, 9; Equity, 3, 4; Mechanics' Liens, 3; Municipal Corporations, 9.

SUBSCRIPTION. See Corporations, 2.

SUBSTANTIVE EVIDENCE. See Evidence, 6; Negligence, 14.

SUITS. See Pleadings, 2.

SUMMONS.

1. *Summons—Process—Statutes—Courts—Justices of the Peace—Superior Courts—Special Appearances—Motions.*—The same requirements as to a proper service of summons in a civil action issuing from the court of a justice of the peace must be observed by the process officer as from the Superior Court, C. S., 1500, Rule 16, and where a copy thereof is not served at the time of its reading to the defendant, the service is invalid, and the action will be dismissed on special appearance and motion, when the defendant has preserved this right by a like motion in the court of the justice of the peace. C. S., 1487, 1488; 3 C. S., 479. *Pass v. Elias*, 497.

SUPERIOR COURTS. See Judgments, 7; Summons, 1.

SUPREME COURT. See Appeal and Error, 3; Courts, 2; Pleadings, 3; Habeas Corpus, 3; Federal Courts, 1.

SURETY. See Bills and Notes, 10; Mechanics' Liens, 2, 7.

SURRENDER OF CHARTER. See Schools, 3.

SURVIVORSHIP. See Tenants in Common, 9.

SUSPENSION OF JUDGMENT. See Criminal Law, 4.

TAGS. See Bills and Notes, 16.

TAXATION. See Municipal Corporations, 1, 3; Schools, 4, 9; Constitutional Law, 6; Game, 2.

1. *Taxation—Constitutional Law—Statutes—Revenue—Machinery Act—County Commissioners—Revaluation of Property.*—A statute that provides for the revaluation and equalization of the value of property by the county commissioners, to be levied in accordance with an existing constitutional statute, is not in its strict sense a revenue law, requiring the separate readings before each branch of the Legislature upon the separate days, etc., prescribed by Art. II, sec. 14, of the State Constitution, but is in the nature of a machinery act, which does not fall within this constitutional requirement. *Hart v. Comrs. of Burke*, 161.

2. *Taxation—Constitutional Law—Classification of Property—Uniformity.* Under the provisions of a statute authorizing the county commissioners to reassess, revalue and equalize property therein for the purpose of taxation, the determination of the commissioners thereunder is not objectionable as not being uniform when the assessment of each class of property is uniform within its own proper classification. *Ibid.*

3. *Taxation—Counties—Assessment—Revaluation—Notice—Constitutional Law.*—Where a statute authorizes a county through its commissioners to revalue and reassess the property therein for taxation, and accordingly the board fixes a time therefor and adjourns for the purpose of having formulated the necessary information upon which they should act, and notice of the time for the taxpayers to be heard has been incorrectly published in a newspaper, and verbally at a certain day of the week and month, and correction likewise made sufficient to appraise the taxpayers in time to appear before the board and be

TAXATION—*Continued.*

heard: *Held*, the proceedings of the commissioners will not be declared invalid by reason of such error. *Ibid.*

4. *Taxation—Counties—Statutes—Remedies—Appeal—Courts.*—Where the property owner is given sufficient notice to appear before the board of county commissioners and object to the valuation placed on his property for taxation, and fails to do so and pursue his remedy by appeal in accordance with the remedy prescribed by the statute applicable, he may not by independent action proceed in our courts to object to the valuation on his property fixed by the commissioners. *Ibid.*

5. *Taxation—Automobiles—Local Agent—Sales Agent—Revenue Act of 1925.*—Where the local dealer in automobiles has paid the license tax of $500 required by section 78, Revenue Act of 1925, and in conformity with the statute has kept the license issued properly posted at its located place of business, the ten-dollar tax is not required to be issued to its sales agents within the territory prescribed for the conduct of the business of a local agent, working directly thereunder. *Trade Association v. Doughton*, 384.

6. *Taxation — Payment of Tax — Actions—Injunction.*—The plaintiff's remedy for contesting the validity of the ruling of the State Commissioner of Revenue in erroneously classifying him as one buying and selling real estate under section 30, ch. 101, Revenue Act of 1925, is by paying the tax under protest and suing to recover it. C. S., 7979, there being no question as to the legality of the tax thus imposed, and there being no element of an equitable nature involved, the remedy by injunction is unavailable. C. S., 858. *Ragan v. Doughton*, 500.

7. *Taxation—Statutes—Exemptions—Interpretation.*—Laws exempting religious, charitable, etc., organizations from a tax imposed are strictly construed, and require express statutory words or expressions to that effect, or the exemptions claimed follow by necessary implication from the language used in the statute. *Rich v. Doughton*, 604.

8. *Same—Inheritance Tax—Religious Organizations—Domestic Corporations—Foreign Corporations.*—Our statute exempting from the inheritance tax "legacies or property passing by will or otherwise . . . to religious," etc., corporations not conducted for profit in this State, applies only to such as are incorporated under the laws of our State, and not to those existing under the laws of other states or foreign countries, and only operating herein. *Ibid.*

9. *Taxation—Schools—Purchase of Lands—Bonds.*—Without legislative authority, a board of education of a county may not purchase additional land for school purposes, or the county commissioners issue bonds for the purpose, and an injunction will lie against their doing so. *Robertson v. Board of Education*, 765.

TAX DEEDS. See Deeds and Conveyances, 7.

TELEGRAPHS AND TELEPHONES. See Contracts, 4, 6; Criminal Law, 1.

TENANTS IN COMMON. See Estates, 6; Issues, 3.

1. *Tenants in Common — Deeds and Conveyances — Possession—Title.*—Where tenants in common divide the lands held among themselves by deed, the deed so given is for the purpose of severing the tenancy, and does not affect the title under which they hold. *Garris v. Tripp*, 211.

TENANTS IN COMMON—*Continued.*

2. *Same—Husband and Wife.*—Two sisters are tenants in common of a tract of land; one sister and her husband releases a one-half interest therein by a deed to the other sister and her husband: *Held*, only the tenancy is secured, and no new estate is created. *Ibid.*

3. *Tenants in Common—Sale for Division—Payment of Purchase Price—Title—Courts—Judgments—Deeds and Conveyances—Statutes.*—Where, under a petition of tenants in common, lands are sold for division under the provisions of C. S., 3241, title to the lands held in common will not pass to the purchaser until the purchase price has been paid, and a deed executed to the purchaser by the one appointed to sell under the order of the court. *Crocker v. Vann*, 422.

4. *Same—Husband and Wife—Estates by Entireties—Judgments—Resulting Trusts—Deeds and Conveyances—Probate—Statutes.*—Where the wife alone is entitled to a deed in the severance of her interest as a tenant in common of lands sold for division, under C. S., 3241, and in proceedings thereunder it is erroneously adjudged by the court that the deed be made to her and her husband by entireties, the title will inure only to her under a resulting trust, and the husband cannot acquire by survivorship: *Held further*, that as such transaction falls within the intent and meaning of C. S., 2515, the special formalities of probate of a conveyance between husband and wife for him to acquire her title would be lacking. *Ibid.*

5. *Same—Color of Title—Adverse Possession—Title—Contract to Purchase.*—Color of title for the wife's separate estate in lands that will ripen title by adverse possession in those claiming under the husband by survivorship, cannot be acquired under a consent judgment conditioned upon the future payment of the purchase price in proceedings under C. S., 3241. *Ibid.*

6. *Same—Judgment—Estoppel.*—In proceedings in dissolution of a partnership between the husband, who has no right of survivorship in his wife's lands and another, it has been determined by judgment of the court that the partnership had purchased only the interest of the husband in the estate of his wife, held by her in common with others, the question of the wife's title to the lands is not determined, and the doctrine of estoppel does not apply. *Ibid.*

7. *Same—Judgment—Color of Title—Partnership—Assets.*—Where, in the dissolution of a partnership upon the death of one of its members, it has been adjudged by the court that the assets of the firm consisted in part of whatever interest the deceased husband may have had in certain lands his wife held in common with others, and it is made to appear that the husband had no such interest therein, such judgment may not be considered as color of title that will ripen the title under adverse possession. *Ibid.*

8. *Tenants in Common—Joint Tenancies—Deeds and Conveyances.*—The incidents of joint tenancy, when the right of survivorship applies, arises by the contract of the parties, and are of the fourfold character of the same interest acquired from the same party under the same conveyance, commencing at the same time, and held by one and the same undivided possession. *Burton v. Cofield*, 505.

TENANTS IN COMMON—*Continued.*

9. *Same—Jus Accrescendi—Survivorship—Statutes.*—The act of 1784, now C. S., 1735, abolishes the right of survivorship in fee in joint tenancies, but not joint estates for life. *Ibid.*

10. *Same—Common Law.*—Where the necessary elements thereof exist in the conveyance of an estate in lands, the law favors the interpretation that a joint tenancy is conveyed under the common-law rule, in the absence of statutory restriction, and of restrictive, exclusive or explanatory words of the conveyance manifesting an intention to create a tenancy in common. *Ibid.*

11. *Same—Children—"Per Capita"—"Per Stirpes"—Deeds and Conveyances—Wills.*—A deed or devise of lands to the two daughters of the grantor or testator for life, and then to their children, without particular designation, but as a class, upon the falling in of the particular estate the "children" of the life tenants take *per capita* and not *per stirpes*. *Ibid.*

12. *Same—Partition—Statutes.*—Where the life tenants under a deed or will take as joint tenants with remainder over to their children, who take per capita, the life tenants may not have their estate in the lands divided under the provisions of C. S., 3215, 1745. *Ibid.*

13. *Tenants in Common—Owelty—Judgments—Limitation of Actions—Notice—Parties.*—Where the commissioners to divide lands held by tenants in common award owelty to one of them to equalize his share with the other, the ten-year statute of limitations begins to run from the confirmation of the report by the clerk, approved by the judge, C. S., 3232, and the fact that the clerk has not docketed the judgment in the seven years, as between the parties having at least constructive notice of the proceedings, does not alone repel the bar of the statute. C. S., 3230, 3231. *Cochran v. Colson*, 663.

14. *Tenants in Common—Mortgages—Ouster—Limitation of Actions.*—Where a mortgage is made to a tenant in common by the other tenants therein, it is an ouster that puts them to their action and commences the running of the statute of limitations, either under seven years color, C. S., 428, or under twenty years otherwise. C. S., 430. *Crews v. Crews*, 679.

TENDER. See Vendor and Purchaser, 1.

TIMBER. See Deeds and Conveyances, 13; Equity, 5.

TIME. See Insurance, 21.

TITLE. See Judgments, 2; Deeds and Conveyances, 1, 19, 20; Evidence, 2; Mortgages, 5; Tenants in Common, 1, 3, 5; Estoppel, 2.

TOOLS AND APPLIANCES. See Master and Servant, 20, 22, 23.

TORTS. See Master and Servant, 4; Negligence, 6, 21; Actions, 5, 6, Pleadings, 14.

TRACKS. See Criminal Law, 7.

TRAFFIC LAWS. See Automobiles, 4; Negligence, 16.

TRANSACTIONS WITH DECEDENT. See Evidence, 9, 10; Wills, 12.

TRANSCRIPT. See Appeal and Error, 4.

TRANSPORTATION. See Carriers, 1; Arrest, 3.

TREASURER. See Highways, 7.

TRESPASS.

1. *Trespass—Husband and Wife—Implied Invitee.*—A wife who accompanies her husband in his automobile to the defendant's place of business in search of work, when the husband has been requested to do so by the defendant, or his authorized agent, and he has parked at the place used by the owner on his premises for that purpose, is an implied invitee. *Brigman v. Construction Co.*, 791.

2. *Same—Negligence—Master and Servant—Employer and Employee—Principal and Agent.*—While ordinarily one who is an implied invitee on the premises of another cannot recover damages for a personal injury caused by conditions that are not observable as a danger or menace to safety, this rule is not applicable when the injury occurs through the positive act of negligence of the owner, or the act of his authorized agent when in the performance of his duty to the owner. *Ibid.*

3. *Same.*—Where, at the request of the authorized agent of a manufacturing corporation, one seeking employment has returned to the premises of the concern in an automobile, accompanied by his wife, and parked his car at the customary place therein, the defendant corporation is liable in damages in the wife's action therefor for the negligence of its employee driving a truck backing into the plaintiff's automoble, proximately causing a personal injury to her. *Ibid.*

TRIALS. See Election of Remedies, 2; Evidence, 26; Reference, 3, 4; Banks and Banking, 21; Appeal and Error, 24, 25, 27.

TRUCKS. See Master and Servant, 6.

TRUSTS. See Banks and Banking, 16; Wills, 11; Estates, 8; Deeds and Conveyances, 20.

1. *Trusts—Deeds and Conveyances—Resulting Trusts—Husband and Wife—Statutes.*—When a deed from a husband to his wife is sought to be set aside by his creditors for fraud, C. S., 1005, 1007, evidence tending to show that she had a resulting trust by reason of her having conveyed the same land to her husband without consideration moving to her, is inadmissible under the principle that a grantor in a deed to lands may not engraft a resulting trust upon his conveyance of the fee-simple title with full covenants and warranty of title. *Tire Co. v. Lester*, 642.

2. *Same—Evidence—Burden of Proof.*—It is upon the one seeking to engraft a parol trust in his own favor upon a conveyance of the fee-simple title, when permissible, to establish his right by clear, strong, and convincing proof. *Ibid.*

ULTRA VIRES ACTS. See Banks and Banking, 1; Municipal Corporations, 1.

UNDUE INFLUENCE. See Wills, 14.

UNIFORMITY. See Taxation, 2.

USES. See Bills and Notes, 10, 14; Wills, 11; Estates, 8.

VALUE. See Taxation, 1, 3; Bills and Notes, 8; Robbery, 1.

VENDOR AND PURCHASER. See Deeds and Conveyances, 3; Contracts, 14, 25, 26, 27, 28; Bills and Notes, 13; Constitutional Law, 1; Fertilizers, 2, 3; Judgments, 11, 13.

1. *Vendor and Purchaser—Automobiles—Contracts—Partial Payments—Tender—Measure of Damages.*—Where a credit company, to whom a dealer had sold a contract and notes upon a partial payment plan, has possessed and wrongfully sold the car after full payment of arrears had been tendered by the purchaser of the car, the measure of damages in the latter's action is the fair market value of the car at the time of the refusal of the tender of payment, not exceeding the purchase price, less whatever amount he may still be due the seller under the terms of his contract. *Epley v. Credit Co.*, 661.

VERDICT. See Robbery, 2; Criminal Law, 3; Damages, 1; Issues, 1, 2; Municipal Corporations, 10; Evidence, 23; Judgments, 13; Instructions, 12.

1. *Verdict—Issues—Interpretation.*—Where the verdict of the jury has determined that the leased premises was rendered unfit for the purposes of the lessee, which, under the terms of the instrument may terminate it, if of sufficient consequence, the verdict to another issue that the repairs were made in a reasonable time should be construed to harmonize with the first one. *Archibald v. Swaringen*, 756.

VESTED INTERESTS. See Wills, 2; Estates, 13.

VESTED RIGHTS. See Courts, 2.

WAIVER. See Courts, 4; Insurance, 20; Evidence, 3; Appeal and Error, 17; Removal of Causes, 5, 7; Judgments, 19.

WARNINGS. See Automobiles, 1; Railroads, 6.

WARRANTY. See Mortgages, 1; Bills and Notes, 14; Contracts, 16; Deeds and Conveyances, 21.

WAYS OF NECESSITY. See Highways, 9, 11.

WILLS. See Limitation of Actions, 1; Estates, 13.

1. *Wills—Interpretation—Intent.*—A will is interpreted in accordance with the intent of the testator, as gathered from the language used in the entire instrument, which may be aided in proper instance from the circumstances surrounding him at the time the will was executed. *Scales v. Barringer*, 94.

2. *Wills — Interpretation — Estates—Vested and Contingent Interests.*—Where there is uncertainty as to the time or person in the creation of a devise or bequest, the interest in the property is contingent and not vested. *Ibid.*

3. *Same—Descent and Distribution.*—A devise of a certain described lot of land to the testator's daughter for life, giving her the power of sale upon ascertainment of the value of her life estate with equal division of the proceeds among the testator's children or their representatives, and if she should not exercise the power, the land to be

WILLS—*Continued.*

sold after her death for a like division: *Held*, the estate in remainder does not vest until either the power of sale under the will has been exercised by the first taker, or at her death; and the children of the testator, or their "representatives," as the case may be, who have died before the happening of either event, have no interest descendible to their heirs at law or subject to their devise. *Ibid.*

4. *Wills—Intent—Interpretation—Surrounding Circumstances.*—The intent of the testator, as gathered from the relevant language used in the will, construed in its entirety, will control its interpretation, and his surrounding circumstances will also be given consideration that may have clearly influenced him in making a disposition of his property. *Van Winkle v. Missionary Union*, 131.

5. *Same—Residuary Clause.*—A residuary clause of a will, wherever placed therein, will be given effect as such when by correct interpretation it appears that it was in conformity with the testator's intent, whether reference is therein made to it as the residue of the estate after specific bequests or devises are provided for, or the words "rest" or "remainder," etc., are used by him. *Ibid.*

6. *Wills—Interpretation—Intent.*—The courts will construe a will as a whole, giving each word and phrase effect to carry out the intent of the testator, and harmonize the language therein employed when such interpretation is reasonable for the purpose. *Roberts v. Saunders*, 191.

7. *Same—Statutes—Fee Simple—Presumption.*—The statutory presumption that a devise of land shall be construed in fee, etc., gives way to the intent of the testator as gathered from the proper construction of the instrument as a related whole. C. S., 4162. *Ibid.*

8. *Same—Estates—Life Estates.*—Under a devise to the testator's wife of all of his "estate, real and personal," and by a later paragraph all of the rest of the testator's property "as above stated," during her widowhood, and should she remarry her dower "according to law": *Held*, only a life estate, according to the testator's intent, is given to his widow, and her conveyance of a fee-simple title is ineffectual, the statutory presumption of a fee-simple title being inoperative. *Ibid.*

9. *Wills—Devises—Heirs—Issue—Estates—Remainders—Contingent Limitations.*—Where a testator devises certain of his lands to his son "and his heirs," the devise will be construed to convey to the son the fee-simple title, but were immediately followed in the same item by the words "and if no heirs at his death, to return to his nearest relations," a different intent is evidenced, and the words "heirs" in the latter clause will be interpreted as children, and upon the happening of the contingency his nearest relations will take under the application of the doctrine of springing or shifting uses. *Massengill v. Abell*, 240.

10. *Same—Statutes.*—Where a devise of lands is limited over should the first taker die without heirs, evidencing that the intent of the testator made the contingency to depend upon his dying without issue, C. S., 1739, has no application. *Ibid.*

11. *Same—Deeds and Conveyances—Uses and Trusts.*—A devise of land to the testator's son and his heirs, and if no heirs, with limitation over: *Held*, the son takes a fee simple, subject to be defeated should he die

WILLS—*Continued.*

without leaving issue, in which event the limitation would take effect under the doctrine of springing or shifting uses, and he could not convey a fee-simple absolute title. *Ibid.*

12. *Wills—Evidence—Transactions and Communications—Deceased Persons—Statutes — Beneficiaries — Executors and Administrators.*—The rule that one interested in a will as a beneficiary and executor may not testify to any transaction or communication with the deceased beneficial to his own interest, unless in rebuttal, under the inhibition of C. S., 1795, does not apply to his testifying to the identity of certain papers as being those which he had previously seen in the testator's presence; nor to the fact that it was the same "will," when only for the purpose and effect of the identification of the sheets in question. *In re Mann*, 248.

13. *Wills—Devise—Lands—Estates—"Heirs at Law"—Descent and Distribution—Personalty.*—Where the testatrix had died leaving her surviving no husband, nor lineal descendants, nor father, nor mother, nor brother, nor sister, nor issue of such, and has by the express terms of her will devised certain residue in her lands, transmitted by descent from her father, to her "heirs at law," these heirs taking under the same tenure the same quality and quantity of the estate, acquire the lands as if transmitted to them under the Fourth Canon of Descent, and not as purchasers under the will, and are to be determined by their being of the same blood of the transmitting ancestor, the father, in exclusion of the collateral relations of the testatrix on her mother's side. As to personalty so devised, the next of kin would take under the statute of distribution. *Yelverton v. Yelverton*, 614.

14. *Wills—Undue Influence—Evidence—Nonexpert Witnesses.*—Evidence is incompetent from a nonexpert witness that the testator, whose will was being tried upon the issue of *devisavit vel non*, was under the undue influence of the wife when making the will in question in her favor. Where undue influence and mental incapacity are in question, it is better to submit each under separate issues. *In re Craig*, 656.

15. *Wills — Devise — Shares of Stock — Specific and General Legacies.*—Whether the accretions of stock dividends are to go under a devise of the original shares to the person specified therein, depends under a correct interpretation of the related items of a will upon whether the devise is general or specific, and where so construed the identity of the shares bequeathed to the specific beneficiaries and owned by the testator at the time, is established, the devise is specific and the accretions accompanying it are a part of the gift itself. *Smith v. Smith*, 687.

16. *Wills — Devise — Estates — Conditions—Contingent Limitations—Husband and Wife.*—A devise of land by a father to his daughter for life, with limitation over to her children, but should her husband predecease her then to her in fee: *Held*, construing the will as a whole, the intent of the testator was to insure the benefit of the gift to her free from the control of her husband during his life, and the one fitting the description at the time of making the will and at the time of testator's death, was particularized as if his name had been given. C. S., 4165. *Gurley v. Wiggs*, 726.

WILLS—*Continued.*

17. *Wills—Devises—Estates—Contingent Interests—Deeds and Conveyances —Defeasible Fee.*—A devise of his homestead to the testator's son "to him and the heirs of his body, if any, and if none then to his brothers and sisters, their heirs and assigns": *Held*, the devisee named in the will may acquire a fee-simple title by deed conveying their "interests both present, past and prospective, vested and contingent," from his living brothers and sisters and the children (all of age) of such as are deceased. *O'Neal v. Borden*, 170 N. C., 483, and other cases cited as controlling. *Grace v. Johnson*, 734.

18. *Wills—Interpretation—Intent.*—In construing a will, the intent of the testator, not in conflict with law, will control and be given effect in connection with the parts relating to the same subject-matter, and in proper instances, with reference to other conditions existing at the time, and which would reasonably have influenced him in making the disposition of his property. *Walker v. Trollinger*, 744.

19. *Same—Estates—Remainders—Conditions—Statutes.*—An estate to the testator's wife for life, expressly providing that she is to have one-half of the products of the land while she lives, without power of disposition of the estate, but to take care thereof with the timber thereon, and at her death to his nephew, upon condition that he remain on the land, take care thereof with the timber and have a certain portion of the products thereof, without power to sell the lands in a certain time, also devising certain domestic articles and animals to her absolutely, together with evidence that the nephew remained with the testator and wife, etc.: *Held*, the wife and nephew were the primary consideration of the testator and the first objects of his bounty, and after the death of the wife, and the performance by him of the conditions set forth in the will, he took a fee-simple title to the lands in preference to the ulterior takers named in the will, to wit, the testator's brother and his children. C. S., 1734. *Ibid.*

20. *Wills—Interpretation—Vesting Estates in Prior Beneficiary—Constitutional Law—Statutes.*—Where, by a correct interpretation of the will, it will reasonably be allowed, the law will favor the early vesting of estates against the interests of a contingent remainderman. Const., Art. I, secs. 30, 31; C. S., 4162. *Ibid.*

WITNESSES. See Homicide, 4; Evidence, 20.

WORDS AND PHRASES. See Instructions, 14.

WORK. See Master and Servant, 23, 24.

WRITTEN INSTRUMENTS. See Contracts, 7, 8, 17, 23; Fraud, 2.

WRONGFUL SEIZURE. See Claim and Delivery, 1.

ZONING DISTRICTS. See Municipal Corporations, 8.

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